produce bastardized remarks that alter or even undermine the meaning of those original statements. But the theoretical possibility of defamatory editing is not enough to carry Colborn's burden. Instead, he must cite specific instances where *Making a Murderer* edited his testimony and changed its meaning in a defamatory fashion. Swapping in "No, sir" for "No, I don't" obviously does not suffice. (ECF No. 105 at 48.) Excising similarly trivial revisions, the "frankenbites" Colborn identifies fall into four baskets: (1) those concerning the 1994 or 1995 phone call; (2) those concerning the 2005 call to dispatch; (3) those concerning the discovery of the Toyota key; and (4) those taken from Colborn's deposition in Avery's civil case. The Court will evaluate them in turn.

1. Edits to Colborn's Testimony About the 1994 or 1995 Phone Call.

At trial, Colborn testified:

> In 1994 or '95 I had received a telephone call when I was working as my capacity as a corrections officer in the Manitowoc County Jail. Telephone call was from somebody who identified himself as a detective. And I answered the phone, Manitowoc County Jail, Officer Colborn. Apparently, this person's assumption was that I was a police officer, not a corrections officer, and began telling me that he had received information that somebody who had committed an assault, in Manitowoc County, was in their custody, and we may have somebody in our jail, on that assault charge, that may not have done it. I told this individual, you are probably going to want to speak to a detective, and I transferred the call to a detective, to the Detective Division, at the Manitowoc County Sheriff's Department. That's the extent of my testimony.

(ECF No. 105 at 47-48.) *Making a Murderer* condenses this testimony:

> In 1994 or '95 I had received a telephone call when I was working as my capacity as a corrections officer in the Manitowoc County Jail. Telephone call was from somebody who identified himself as a detective, and began telling me that he had somebody who had committed an assault, in Manitowoc County, was in their custody, and we may have somebody in our jail, on that assault charge, that may not have done it. I told this individual, you are probably going to want to speak to a detective, and I transferred the call to a detective.

(*Id.*) Nothing in the abridged version of Colborn's statement "differ[s] materially in meaning from [the original] so as to create an issue of fact for a jury as to falsity." *Masson*, 501 U.S. at 521. *Making a Murderer*'s edits eliminate redundancies, *i.e.*, Colborn repeating his position and reiterating that he transferred the call to detectives, without sacrificing truth. Synthesizing a

lengthy explanation is not defamatory. *Id.* at 524. The revised passage is, thus, substantially the same as the original and not false for purposes of defamation.

During cross-examination, Strang followed up with Colborn about the phone call:

> STRANG: [W]hile we're on Steven Avery and your reports about him, that phone call, the phone call you took way back in 1994 or 1995, when you were working in the jail, the phone call where a detective from another law enforcement agency told you you may have the wrong guy in jail, that one?
>
> COLBORN: Yes, sir.
>
> STRANG: Did you ever write a report about that?
>
> COLBORN: No, sir.
>
> STRANG: Well, actually you did, didn't you? It was about eight years later, wasn't it?
>
> COLBORN: I wrote a statement on it, yes, sir.
>
> STRANG: You wrote a statement after Sheriff Peterson suggested that maybe you should?
>
> COLBORN: Yes, sir.
>
> STRANG: You wrote that statement in 2003, about the 1994 or 1995 telephone call?
>
> COLBORN: Yes.
>
> STRANG: You wrote that statement in 2003, the day after Steven Avery finally walked out of prison, didn't you?
>
> COLBORN: I don't know what day Steve was released from prison, but I wrote the statement in 2003.

(ECF No. 105 at 51-52.) In *Making a Murderer*, the exchange goes like this:

> STRANG: [W]hile we're on Steven Avery and your reports about him, that phone call, the phone call where a detective from another law enforcement agency told you [you] may have the wrong guy in jail, that one?
>
> COLBORN: Yes, sir.
>
> STRANG: Did you ever write a report about that?
>
> COLBORN: No, I did not, sir.
>
> STRANG: Well, actually you did, didn't you? It was about 8 years later, wasn't it?
>
> COLBORN: I wrote a statement on it, yes, sir.
>
> STRANG: You wrote a statement in 2003, about the 1994 or 1995 telephone call?
>
> COLBORN: Yes.

> STRANG: [T]he day after Steven Avery finally walked out of prison, didn't you?
>
> COLBORN: I don't know what day Steve was released from prison, but I wrote the statement in 2003.

(*Id.*) Both versions convey the same substance—that Colborn wrote a report about a phone call eight years after he received it, around the time of Avery's exoneration. The only notable difference is that *Making a Murderer* omits Sheriff Petersen's suggestion that Colborn draft the report. This hardly makes the testimony false, especially considering that, by this point in the docuseries, Stephen Glynn has already told viewers that the sheriff ordered a report from Colborn and Lenk. (*See* ECF No. 320 at 10.)

On redirect, special prosecutor Kratz and Colborn had the following exchange regarding the phone call:

> KRATZ: As you look back, back in 1994 or '95, if you would have written a report, what would it have been about?
>
> COLBORN: That is why I didn't do one. I don't know what it would have been about, that I received a call and transferred it to the Detective Division. If I wrote a report about every call that came in, I would spend my whole day writing reports.
>
> KRATZ: Did this person ever identify the individual that they were talking about?
>
> COLBORN: No, sir. There were no names given.
>
> KRATZ: Let me ask you this, as you sit here today, Sergeant Colborn, do you even know whether that call was about Mr. Steven Avery?
>
> COLBORN: No, I don't.

(ECF No. 105 at 52.) In *Making a Murderer*, this exchange is shortened and presented as part of Kratz's direct examination:

> KRATZ: Back in 1994 or '95, if you would have written a report, what would it have been about?
>
> COLBORN: I don't know what it would have been about. If I wrote a report about every call that came in, I would spend my whole day writing reports.
>
> KRATZ: Let me ask you this, Sergeant Colborn, do you even know whether that call was about Mr. Steven Avery?
>
> COLBORN: No, sir.

(*Id.*) This, too, adequately captures the gist of Colborn's testimony—the identity of the potentially wrongfully incarcerated individual who was the subject of the 1994 or 1995 phone call was not

established during that call, so Colborn had nothing to write a report about. Both the original and edited passages reflect that Colborn lacked the necessary information to make a report worthwhile; the latter is not materially false.

2. Edits to Colborn's Testimony About the 2005 Call to Dispatch.

During Avery's trial, Strang played Colborn an extended recording of his November 3, 2005 call to dispatch. (ECF No. 105 at 53-54.) During the call, Colborn gave the dispatcher Halbach's license plate number and asked to confirm that the car was a 1999 Toyota. (*Id.*) Recapping the call, Strang initiated the following exchange:

> STRANG: And the dispatcher tells you that the plate comes back to a missing person or woman?
>
> COLBORN: Yes, sir.
>
> STRANG: Teresa Halbach. Mispronounces the last name, but you recognize the name?
>
> COLBORN: Yes, sir.
>
> STRANG: And then you tell the dispatcher, "Oh, '99 Toyota"?
>
> COLBORN: No, I thought she told me that.

(ECF No. 290-19 at 184.) Strang then replayed the audio and said:

> STRANG: Actually you who suggests this is a '99 Toyota?
>
> COLBORN: I asked if it was a '99 Toyota, yes.
>
> STRANG: And the dispatcher confirmed that?
>
> COLBORN: Yes.

(*Id.* at 185.) *Making a Murderer* excludes Colborn's admission of his mistake. (ECF No. 105 at 12.) Colborn believes that omission defamatory and cites to an uncommon, online source to prove it. According to Redditor u/docuseriesfan, the way the docuseries presented the testimony left viewers with the misimpression that Colborn "didn't have much of a response after [Strang] played the recording twice." (ECF No. 132-7.) There are two problems with relying on this kind of evidence. First, defamation is (mercifully) not proven in the bowels of social media websites, especially niche subreddits. No publisher is required "to guarantee the truth of all the inferences a [viewer] might reasonably draw from a publication." *Woods v. Evansville Press Co., Inc.*, 791 F.2d 480, 487 (7th Cir. 1986). Second, and more importantly, *Making a Murderer* got the sting of this portion of testimony right. An inaccuracy is not a falsehood under defamation law unless "it 'would have a different effect on the mind of the reader from that which the pleaded truth would

have produced.'" *Masson*, 501 U.S. at 517 (quoting Sack, *supra*). The reality is that Colborn *did not* actually have much of a response after Strang replayed the dispatch audio. He simply agreed that he had, indeed, first raised the make and year of the vehicle. That much is evident from the first and second listen. Omitting one sentence restating the obvious and instead segueing directly into the next line of questioning did not injure Colborn's reputation any more or less than a verbatim reproduction would have. *See Haynes*, 8 F.3d at 1229 (no defamation where variants of the truth did not paint the plaintiff in a worse light).

Immediately after the preceding exchange, Strang pressed Colborn to answer how he could have called in a license plate if he was not already looking at it. (ECF No. 105 at 55.) The implication being that Colborn discovered Halbach's Toyota two days before it was officially found on Avery's property and therefore had the opportunity to plant the Toyota there as part of a frame-up.

> STRANG: Were you looking at these plates when you called them in?
>
> COLBORN: No, sir.
>
> STRANG: And your best guess is that you called them in on November 3, 2005?
>
> COLBORN: Yes, probably after I received a phone call from Investigator Wiegert letting me know that there was a missing person.
>
> STRANG: Investigator Wiegert, did he give you the license plate number for Teresa Halbach when he called you?
>
> COLBORN: I don't remember the entire content of our conversation, but, obviously, he must have because I was asking the dispatcher to run the plate for me.
>
> STRANG: Did you not trust that Investigator Wiegert got the number right?
>
> COLBORN: I don't – That's just the way I would have done it. I don't – It's not a trust or distrust issue.

(ECF No. 290-19 at 185-86.) At this point, the parties took their afternoon recess. When they returned, Strang mistakenly asked Colborn if Wiegert had given him Halbach's *phone number*. He then corrected himself:

> STRANG: I'm sorry. I apologize. What I meant is, you don't recall, as you sit here today, whether Mr. Wiegert gave you Teresa

> Halbach's license plate number when he called you on November 3?
>
> COLBORN: You know,[8] I just don't remember the exact content of our conversation then.
>
> STRANG: But –
>
> COLBORN: He had to have given it to me because I wouldn't have had the number any other way.
>
> STRANG: Well, and you can understand how someone listening to that might think that you were calling in a license plate that you were looking at on the back end of a 1999 Toyota; from listening to that tape, you can understand why someone might think that, can't you?
>
> KRATZ: It's a conclusion, Judge. He's conveying the problems to the jury.
>
> THE COURT: I agree, the objection is sustained.
>
> STRANG: This call sounded like hundreds of other license plate or registration checks you have done through dispatch before?
>
> COLBORN: Yes.
>
> STRANG: But there's no way you should have been looking at Teresa Halbach's license plate on November 3, on the back end of a 1999 Toyota?
>
> KRATZ: Asked and answered, your Honor, he already said he didn't and was not looking at the license plate.
>
> THE COURT: Sustained.
>
> STRANG: There's no way you should have been, is there?
>
> COLBORN: I shouldn't have been, and I was not looking at the license plate.
>
> STRANG: Because you are aware now that the first time that Toyota was reported found was two days later on November 5?
>
> COLBORN: Yes, sir.

(*Id.* at 187-88.) *Making a Murderer* omits a significant chunk of this and inserts a portion of testimony (*italicized* below) given a few minutes earlier:

> STRANG: Were you looking at these plates when you called them in?

[8] In the trial transcript, Colborn is quoted as saying: "No, I just don't remember the exact content of our conversation then." (ECF No. 290-19 at 187.) The video exhibits, however, conclusively show that he actually said: "*You know*, I just don't remember the exact content of our conversation then." (ECF No. 283-13 at 13-16); *see Scott v. Harris*, 550 U.S. 372, 380-81 (2007) (requiring courts considering summary judgment motions to view the facts in the light depicted by the objective evidence).

> COLBORN: No, sir.
>
> *STRANG: Do you have any recollection of making that phone call?*
>
> *COLBORN: I'm guessing 11/03/05, probably after I received a phone call from Investigator Wiegert letting me know that there was a missing person.*
>
> STRANG: Investigator Wiegert, did he give you the license plate number for Teresa Halbach when he called you?
>
> COLBORN: You know, I just don't remember the exact content of our conversation then.
>
> STRANG: But –
>
> COLBORN: He had to have given it to me, because I wouldn't have had the number any other way.
>
> STRANG: Well, and you can understand how someone listening to that might think that you were calling in a license plate that you were looking at on the back of a 1999 Toyota?
>
> COLBORN: Yes.
>
> STRANG: But there's no way you should have been looking at Teresa Halbach's license plate on November 3, on the back end of a 1999 Toyota?
>
> COLBORN: I shouldn't have been, and I was not looking at the license plate.
>
> STRANG: Because you are aware now that the first time that Toyota was reported found was two days later on November 5?
>
> COLBORN: Yes, sir.

(ECF No. 105 at 55-56; ECF No. 290-19 at 185-86.)

Colborn is correct that this amalgamation of truncations and "frankenbites" does not cleanly track the trial transcript. But, again, that is not enough. An author may even attribute words he never uttered to a speaker without running afoul of defamation law, so long as the result conveys the substantial truth. *See Masson*, 501 U.S. at 514-15. Colborn argues that resecting his response—"obviously" Wiegert must have given him Halbach's license plate number—subjected him to "significantly greater opprobrium" because it lent credence to Strang's theory of the case. *Haynes*, 8 F.3d at 1228 (quoting *Herron v. King Broad. Co.*, 776 P.2d 98, 102 (Wash. 1989)). *Making a Murderer* does, however, feature Colborn explaining that Wiegert "had to have given [the license plate number] to me, because I wouldn't have had the number any other way." (ECF No. 105 at 55.) In both passages, Colborn reaches his conclusion through deduction, not

recollection. He admits he cannot remember the conversation with Wiegert but reasons that it must have been the source of Halbach's license plate through process of elimination. Including "obviously" may have intimated a slightly stronger sense of conviction, but its exclusion does not mean that the docuseries departed from the substantial truth or failed to capture the gist of Colborn's testimony. *See Masson*, 501 U.S. at 524 (finding no material falsity when an author wrote that the subject of his piece changed his name because "it sounded better" instead of using the subject's actual explanation that he "just liked" it).

Colborn also challenges the producers' decision to show him agreeing that he could understand how someone might think he was looking at Halbach's Toyota based only on the audio of his dispatch call. In fact, Colborn never answered that question because his attorney objected, and the judge sustained the objection. (ECF No. 290-19 at 188.) But, though not depicted in *Making a Murderer*, Colborn later affirmed on the witness stand that the call sounded like hundreds of other license plate or registration checks he had done before. (ECF No. 105 at 55-56.) In essence, he testified that the audio closely resembled a mine-run dispatch call. And a mine-run dispatch call involves an officer "giv[ing] the dispatcher the license plate number of a car they have stopped, or a car that looks out of place for some reason." (ECF No. 290-19 at 179.) Thus, Colborn implicitly admitted that, based only on the audio of his dispatch call, it sounded like he had Halbach's license plate in his field of vision. This is not materially different from saying that he could understand why someone would think he was looking at Halbach's license plate when he made the call. On top of this, *Making a Murderer* includes Colborn forcefully denying that he ever saw Halbach's vehicle on November 3, 2005. In context, this captures the sting of his testimony—Wiegert must have given him the license plate number, and although it sounded like he was reading the license plate number off a car, he was not in fact doing so.

3. Edits to Colborn's Testimony About Discovering the Toyota Key.

On direct examination, Kratz and Colborn had the following exchange:

> KRATZ: Have you ever planted any evidence against Mr. Avery?
>
> COLBORN: That's ridiculous, no I have not.
>
> KRATZ: Have you ever planted any evidence against anybody in the course of your law enforcement career?
>
> COLBORN: I have to say that this is the first time my integrity has ever been questioned, and no, I have not.

(ECF No. 105 at 48.) *Making a Murderer* fuses this into a single question and response:

> KRATZ: Have you ever planted any evidence against Mr. Avery?
>
> COLBORN: I have to say that this is the first time my integrity has ever been questioned, and no, I have not.

(*Id.*) This neither materially altered Colborn's testimony, nor exposed him to significantly greater opprobrium. *Making a Murderer* communicates in two lines what the trial transcript conveys in four. That is narrative efficiency, not defamation.

4. Edits to Colborn's Deposition in Avery's Civil Case.

During his deposition, Glynn asked Colborn whether he had spoken to anyone about the 2003 statement he authored regarding the 1994 or 1995 phone call:

> GLYNN: And do you recall any further conversations with Sheriff Petersen about this subject matter?
>
> COLBORN: No.
>
> GLYNN: How about any meetings with District Attorney Rohrer about this subject matter, and again, I mean the subject matter of Exhibit 138 that we've been discussing. [9]
>
> COLBORN: No, I've never had a meeting with the district attorney about this.
>
> GLYNN: Okay. How about an assistant district attorney named Mike Griesbach?
>
> COLBORN: Never had a meeting with Mike Griesbach about this.
>
> GLYNN: [H]ave you ever had any conversations with anybody else, other than Sheriff Peterson and Lieutenant Lenk, about the subject matter of Exhibit 138? Ever discuss it with anyone else, any other officers, any friends, any family?
>
> COLBORN: Not that I can specifically recall. I may have mentioned it to other people, but I don't recall doing it.
>
> GLYNN: That is, as you're sitting here today, you don't have any specific recollection of discussing it with anybody else.
>
> COLBORN: No, sir.
>
> GLYNN: But you're not ruling out the possibility that you may have discussed it.
>
> COLBORN: No, I'm not ruling out that possibility that I may have discussed it with someone else, but I can't specifically tell you names of people I may have mentioned this to.

(ECF No. 120-14 at 7.) *Making a Murderer* depicts only a smidgen of this:

[9] Exhibit 138 was Colborn's 2003 statement about the 1994 or 1995 phone call he received. (ECF No. 120-14 at 3.)

> GLYNN: Have you ever had any conversations with anybody else other than Sheriff Petersen and Lieutenant Lenk about the subject matter of [E]xhibit 138? Ever discuss it with anyone else, any other officers, any friends, any family?
>
> COLBORN: Not that I can specifically recall. I may have mentioned it to other people, but I don't recall doing it.

(ECF No. 105 at 32.) The docuseries then transitions to edited excerpts from the depositions of Manitowoc County District Attorney Mark Rohrer and Manitowoc County Chief Deputy Eugene Kusche. Walt Kelly (another of Avery's lawyers in his civil case) and Rohrer are shown having the following conversation:

> KELLY: At the time that you received information from the crime lab telling you that Gregory Allen was inculpated in the sexual assault of Mrs. Beernsten, did you have conversation with any people in the Sheriff's office?
>
> ROHRER: Yes.
>
> KELLY: Who were they?
>
> ROHRER: Andy Colborn, and Jim Lenk had information that he had received.

(*Id.*) Kusche's deposition proceeds:

> KELLY: This document reflects a conversation between you and [Manitowoc County Assistant District Attorney] Douglass Jones shortly after it became public knowledge that Steven Avery had been exculpated and that Gregory Allen had been inculpated, right?
>
> KUSCHE: That's correct.
>
> KELLY: All right. He says as he, Doug Jones, was trying to close the conversation, you told him that in 95 or 96 Andy Colborn had told Manitowoc County Sheriff Tom Kocourek that an officer from Brown County had told Colborn that Allen and not Avery might've actually committed the [Beerntsen] assault. Okay? Did you in fact tell that to Douglass Jones?
>
> KUSCHE: I don't recall.
>
> KELLY: All right. Does seeing this document, 124,[10] refresh your recollection?
>
> KUSCHE: My recollection of this conversation, which is not very strong, was that Colborn made a comment to me about re-- getting some information…

[10] Exhibit 124 is Douglass Jones' September 18, 2003 memo regarding a conversation he had with Kusche about the Avery exoneration. (ECF No. 120-18 at 2.)

> KELLY: Yeah …. Okay the statement goes on and says, the next sentence says, "Gene stated," that's you, "that Colborn was told by Kocourek something to the effect that we already have the right guy, and he should not concern himself." Now, did Colborn tell that to you?
>
> KUSCHE: I don't recall….
>
> KELLY: Do you have any reason to believe that Doug Jones would misrecord what you told him?
>
> KUSCHE: No.
>
> KELLY: Then it goes on to say that Doug Jones asked you if this information was known. Do you remember asking that?
>
> KUSCHE: No.
>
> KELLY: Then it goes on to say that you said James Lenk … was aware. Did you tell that to Doug Jones?
>
> KUSCHE: If he put it there, I probably did.
>
> KELLY: And what was the basis for your knowledge about that?
>
> KUSCHE: It would have had to have been from Andy Colborn.

(*Id.* at 33-34) (cleaned up).

Colborn contends this deposition mashup unfairly depicts him as a liar because it undermines his assertion that he may have discussed his statement with others but did not remember doing so, without incorporating his qualification that he was not ruling out the possibility that he spoke to others. This effort, like so many of Colborn's attempts to construct a defamation claim, fails because the docuseries provides a reasonably accurate summation of the gist of the underlying statement. Indeed, contrary to Colborn's suggestion, *Making a Murderer* does incorporate the supposedly missing qualification. Colborn is shown explicitly stating that he cannot "specifically recall" speaking about his statement with others, but that he "may have mentioned it to other people." That qualification is materially the same as "not ruling out the possibility" of speaking with others. Moreover, by excluding certain portions of his deposition testimony, *Making a Murderer* may have actually *enhanced* Colborn's credibility. At his deposition, Colborn unequivocally denied ever broaching the 1994 or 1995 phone call with District Attorney Rohrer. (ECF No. 120-14 at 7.) Rohrer's testimony called that into question. (ECF No. 120-12 at 11.) Were *Making a Murderer* the calibrated hit piece Colborn claims, its producers surely would have leapt at the chance to catch the object of their disdain in an outright lie.

Colborn also decries the juxtaposition of his deposition testimony with Glynn's soliloquy questioning the absence of a paper trail regarding the 1994 or 1995 phone call:

> [Deposition footage]
>
> GLYNN: [Referring to the 1994 or 1995 phone call] I mean that's a significant event.
>
> COLBORN: Right, that's what stood out in my mind.
>
> [Glynn's interview]
>
> GLYNN: The fellow who got that call was a guy named [Colborn]. And you might say that there should be a record of him immediately making a report on this, there might be a record of his immediately contacting a supervising officer, there might be a record of him contacting a detective who handles sexual assault cases, ahh, there might be some record of it. But if you thought any of those things, you'd be wrong because there isn't any record in 1995, 1996, 1997, 1998, 2000, 2001, 2002, 2003. Now 2003 is a year that has meaning because that's when Steven Avery got out. And the day he got out, or the day after, that's when [Colborn] decides to contact his superior officer, named Lenk. And Lenk tells him to write a report.

(ECF No. 105 at 30.) Once more, nothing here is false. Colborn testified that the phone call was a significant event, and there was no *record* of what he did with the information he received until 2003. The absence of that record does not mean *Making a Murderer* communicates that Colborn took no action. On the contrary, the documentary shows him explaining that he transferred the call to a detective. That it does not undertake additional explanation to make Colborn look better does not render the material presented false or defamatory.

Ultimately, every alteration Colborn identifies retains the gist of its source material. "The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). Modifications that maintain meaning do not implicate this interest and are, therefore, not compensable in defamation. Because, on the evidence in the record, no reasonable jury could find that *Making a Murderer*'s edits to Colborn's testimony materially changed the substance of that testimony, Defendants are entitled to summary judgment as to every allegedly fabricated quotation.

C. Colborn Does Not Have Sufficient Evidence to Pursue a Defamation by Implication Claim.

While the individual statements and "frankenbites" that Colborn cites all fail to support a defamation claim, he makes a better, although still unsuccessful, effort to establish defamation by tying them together. Under Wisconsin law, "[t]he 'statement' that is the subject of a defamation action need not be a direct affirmation, but may also be an implication." *Fin. Fiduciaries, LLC*, 46 F.4th at 665 (quoting *Mach v. Allison*, 656 N.W.2d 766, 772 (Wis. Ct. App. 2002)). "In a case of defamation by implication, the court must decide 'whether an alleged defamatory implication is fairly and reasonably conveyed by the words and pictures of the publication.'" *Id.* (quoting *Mach*, 656 N.W.2d at 778). As with other theories, the plaintiff must also proffer at least enough evidence to raise a jury question as to material falsity and actual malice. *Saenz v. Playboy Enterprises, Inc.*, 841 F.2d 1309, 1317 (7th Cir. 1988). Additionally, "where the plaintiff is claiming defamation by [implication], he also must show with clear and convincing evidence that the defendants intended or knew of the implications that the plaintiff is attempting to draw from the allegedly defamatory material." *Id.* at 1318. "Evidence of defamatory meaning and recklessness regarding potential falsity does not alone establish the defendant's intent." *Id.* (citing *Woods*, 791 F.2d at 487).

Colborn argues that *Making a Murderer* falsely implies that he committed criminal acts (planting evidence) and is thus defamatory per se. *See Teague v. Schimel*, 896 N.W.2d 286, 300 (Wis. 2017) (holding that falsely imputing commission of a criminal act is defamation per se). Defendants assert that Colborn's case falls short for at least three reasons: (1) the implication that Colborn planted evidence is not reasonably conveyed and attributable to Defendants; (2) Colborn cannot prove that he did not plant evidence; and (3) Colborn cannot satisfy defamation by implication's heightened actual malice standard. The first two arguments fail; a reasonable jury might find that *Making a Murderer* falsely implied that Colborn planted evidence. But because Defendants are correct that Colborn cannot show actual malice, this theory also fails.

1. A Jury Could Find that *Making a Murderer* Reasonably Conveys the Defamatory Implication that Colborn Planted Evidence and Also Find that Implication False.

"The court decides, as a matter of law, whether an alleged defamatory implication is fairly and reasonably conveyed by the words and pictures of [a] publication or broadcast." *Mach*, 656 N.W.2d at 712 (citing *Puhr v. Press Publ'g Co.*, 25 N.W.2d 62 (1946)). If there are competing

implications—one defamatory and one not—the duty to decide which the broadcast implies shifts to the jury. *Id.*

Defendants analogize this case to *Financial Fiduciaries*, which generally protects news media's right to truthfully report *allegations*, even if the truth of those allegations is suspect. 46 F.4th at 665-66; *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) (recognizing the First Amendment right to report the proceedings of government). But *Financial Fiduciaries* concerned a quintessential case of local news reporting that fell "comfortably within the . . . [reporting] privilege" identified in Wisconsin caselaw. 46 F.4th at 666. *Making a Murderer*, on the other hand, transcends objective journalism and tries to dramatize courtroom business in a manner that the fair report privilege does not obviously contemplate. It is more than a bare recitation of "just the facts." To do as Defendants wish and lump this kind of prestige television in with meat and potatoes beat reporting would expand the scope of the fair report privilege to a degree that is inconsistent with the common law or existing First Amendment authorities.

And without the privilege, the question of whether *Making a Murderer* implicitly adopted and reasonably conveyed the planting accusations raised by Avery and the members of his criminal defense team is for the jury to decide. A "reasonable documentary viewer" does not necessarily conflate the opinions of a documentary's subjects with those of the documentarians. For example, the documentary *Behind the Curve* profiles flat-earther Mark Sargent, but it does not, itself, imply that the Earth is flat. *Making a Murderer* takes a much different tack. Had it scored Avery's allegations to the sound of cuckoo clocks, no one could rationally accuse it of pedaling conspiracy.[11] A faithful recreation of the entire trial, framing defense and all, would also have defeated any claim for defamation. Yet *Making a Murderer* is not always so evenhanded in its presentation. To the extent it qualifies as journalism, it often hews closer to gonzo than objective, and its visual language could be read to suggest something perhaps more nefarious than the totality of the evidence warrants. Thus, a fair-minded jury could conclude that *Making a Murderer* not-so-subtlety nudges viewers toward the conclusion that Colborn did, in fact, plant evidence to frame Steven Avery.

The same jury could also find that implicit conclusion false. *See Torgerson*, 563 N.W.2d at 477 ("If the challenged statements as a whole are . . . substantially true, a libel action will fail.")

[11] Defendants certainly knew how to incorporate music to influence the viewers' perceptions. As discussed above, they used specific motifs to suggest Manitowoc County officials may have been up to no good.

(citing *Meier v. Meurer*, 98 N.W.2d 411 (1959)). To qualify as false, a "statement must: (1) assert or imply a fact that is capable of being proven false; or (2) . . . assert an opinion that directly implies the assertion of an undisclosed defamatory fact." *Wesbrook v. Ulrich*, 90 F. Supp. 3d 803, 810 (W.D. Wis. 2015) (citing *Mach*, 656 N.W.2d at 772). "[S]tatements of opinion are not actionable if they merely express 'a subjective view, an interpretation, a theory, conjecture, or surmise,' unless the defendant claims or purports to possess specific and objectively verifiable facts supporting that opinion." *Id.* at 810-11 (quoting *Haynes*, 8 F.3d at 1227).

As Special Prosecutor Kratz acknowledged in his closing argument, Avery's guilty verdict does not exonerate those accused of executing a frame-up. (ECF No. 326 at 22.) On what grounds, then, Defendants ask, can Colborn ascribe falsity to the implication that he framed Steven Avery? There is, admittedly, no formal paperwork absolving Colborn of guilt. But in asking for such proof, Defendants seek too much. If the media has license to accuse anyone of committing a crime unless he can categorically disprove that he has done so, then the protected interest in one's good name depends wholly on the altruism of journalists. What could a plaintiff in Colborn's position do to satisfy Defendants' proposed standard? Even acquittal is not akin to absolution, and there is no branch of logic that sanctions proof of a negative. Under Defendants' view, substantial truth is not only a defense, it is the default unless a defamation plaintiff can show beyond doubt what *did not* happen. That is not the standard. "A statement is … defamatory if, in its natural and ordinary sense, it imputes to the person charged commission of a criminal act." *Converters Equip. Corp. v. Condes Corp.*, 258 N.W.2d 712, 715 (Wis. 1977). If there is no basis for the allegation of criminal conduct, then, for purposes of defamation, the allegation may be considered false. And under Wisconsin law, falsity should go to the jury unless obviously not in dispute. *See Martin v. Outboard Marine Corp.*, 113 N.W.2d 135, 140 (Wis. 1962). A reasonable jury could hold Defendants' statement false, so they are not entitled to summary judgment on the question of falsity.

2. Colborn Cannot Show Actual Malice.

To survive summary judgment, a public figure who brings a defamation claim must present enough evidence to allow a jury to find actual malice with convincing clarity. *Woods*, 791 F.2d at 484. Normally, actual malice exists where a defendant "publishe[s] [a] defamatory statement with knowledge of its falsity or with reckless disregard for whether it [is] false." *Id.* (citing *Sullivan*, 376 U.S. at 280). In the context of defamation by implication, though, actual malice requires

evidence that would permit a jury to conclude "that the defendants either *intended* or were reckless with regard to the potential falsity of the *defamatory inferences* which might be drawn from the [publication]." *Saenz*, 841 F.2d at 1318 (emphasis added). And this is determined subjectively, "not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Thus, defamation defendants are entitled to judgment as a matter of law unless "pretrial affidavits, depositions or other documentary evidence" evince an intention to imply the defamatory implication the plaintiff identifies. *Carson v. Allied News Co.*, 529 F.2d 206, 210 (7th Cir. 1976) (quoting *Wasserman v. Time, Inc.*, 424 F.2d 920, 922-23 (D.C. Cir. 1970) (Wright, J., concurring)).

Colborn cites a trove of email chains that purportedly establish the actual malice of both the producers and Netflix. Most of these exchanges, however, support Defendants' position that they did not intend to imply and were not aware that viewers might infer that Colborn actually planted evidence to frame Avery.

The following sample of supposedly damning emails illustrates the dearth of evidence suggesting actual malice on the part of Ricciardi, Demos, and Chrome:

- In an email to Ricciardi, Mary Manhardt (a consulting editor who joined the producers' team in 2015) stated that the "[Avery salvage] yard and the rotting cars" were "metaphorical and evocative of our underdog heroes," while "the Manitowoc Courthouse Dome is a symbol . . . for the overdogs." (ECF No. 330-2 at 1.)
- In an email to Manhardt, Ricciardi wrote that Special Prosecutor Kratz would have "his day only for his 'story' to be retold by our more reliable narrators in the episode." (*Id.* at 39.)
- In an email to Ricciardi and Demos, Manhardt explained that in Episode 3, the producers could use Avery's defense team and family to make "the audience has to regain faith in [Avery] and start questioning the evidence." She also proposed trying "to make the audience feel very guilty and be kicking themselves for having learned nothing from the first case and having believe the [prosecutor's] press conference." (*Id.* at 9.)
- Peter Stone, who was responsible for compiling the trailer, emailed Demos and told her that he had replaced a shot with Colborn taking the oath at his deposition with a "squirmy shot." (ECF No. 330-7 at 1.)
- In an email to Nishimura and Del Deo, Ricciradi and Demos said they had met with Avery's former lawyer and "discussed the idea of re-testing the bloodstains found in Teresa's car." (ECF No. 330-1 at 73.)

Nothing in any of these emails indicates an intent to imply that Colborn framed Avery. That Manhardt saw underdogs and overdogs is irrelevant. Being an overdog means one is expected

to prevail, not that one is guilty of any particular crime. Similarly, intending to portray Kratz as an unreliable narrator is not the same as intending to imply that Colborn planted evidence. Nor is Manhardt's desire to make the audience feel guilty a smoking gun. The audience could feel guilt without the producers intending to imply that Colborn executed a frame job. Stone did not work for the producers, and his decision to use a squirmy shot does not suffice to show intent to imply criminal conduct anyway. And discussing the possibility of retesting some evidence is in no way tantamount to admitting an intention to defame Colborn. (ECF No. 330-1 at 73.)

At most, this collection of emails suggests the producers' sympathy for Avery's plight. But even sympathy for the devil is not clear and convincing proof of actual malice toward the Holy Trinity. *See Saenz*, 841 F.2d at 1319. In fact, under Seventh Circuit precedent, a publisher can omit one side of a story's vehement denials without intending to distort or recklessly disregard the truth. *Id.* Here, the producers included Colborn's denials as well as clips tending to undermine Avery's claims. (ECF No. 294 at 38.) Furthermore, in interviews conducted contemporaneous to *Making a Murderer*'s release, Ricciardi and Demos said they were "not trying to provide any answers," did not "have a conclusion," and that "there are a lot of questions here." (ECF No. 294 at 40-41.) This undercuts any inference of defamatory intent or reckless disregard.

Ultimately, the case against Ricciardi, Demos, and Chrome bears a striking resemblance to defamation plaintiffs' failed gambits in *Woods* and *Saenz*. In the former, the Seventh Circuit rejected a claim of defamation by implication because the plaintiff failed to muster evidence of intent. *See Woods*, 791 F.2d at 487-88. The Court noted that "[t]he result . . . might be different if the [publication] could reasonably have only the meaning the plaintiff ascribes to it or if there was evidence that [the author] harbored ill-will for the plaintiff." *Id.* at 488. But in the absence of either circumstance, it was not enough that the statement at issue could reasonably "be read to contain a defamatory inference" because that did not mean that inference was "the only reasonable one" that could be drawn, nor did it mean "the publisher of the statement either intended the statement to contain such a defamatory implication or even knew that readers could reasonably interpret the statement to contain the defamatory implication." *Id.* at 486. Like the plaintiff in *Woods*, Colborn lacks evidence of intent or reckless disregard, and he also cannot show that *Making a Murderer* has only one reasonable interpretation or that the producers were motivated by ill-will. In *Saenz*, the defamation plaintiff demonstrated only that the article in question was "capable of supporting false and defamatory implications of which [the publishers], according to

their uncontradicted affidavits, were unaware." 841 F.2d at 1319. It did not even matter that one of the authors uttered words that might have indicated a belief in the alleged defamatory inference because that did not "constitute clear and convincing evidence that the defendants knew or intended the defamatory inferences that might . . . be drawn from their publication." *Id.* (citing *Liberty Lobby*, 477 U.S. at 256). Colborn's case against *Making a Murderer*'s producers is even weaker because he has nothing approaching evidence of Ricciardi's or Demos' subjective belief that he planted evidence against Avery.

In sum, a reasonable jury might conclude that *Making a Murderer* implied that Colborn framed Avery, but because Colborn has no evidence that Ricciardi, Demos, or Chrome intended that implication or recklessly disregarded its possible existence *with malice*, the producers are entitled to summary judgment.

As for the case against Netflix, Colborn again references manifold communications, only one of which remotely touches on actual malice:

- In notes sent to Ricciardi and Demos regarding Episode 1, Netflix's creative team asked: "Do we have any great family pictures of the Avery's here?" Netflix also suggested making "them look like a very happy family." (ECF No. 286-11 at 4.)
- Netflix told the producers that Episode 1 needed "a more explicit ending that makes it clear that in the next episode the cops are going to seek revenge." (ECF No. 286-9 at 5.)
- With respect to Episode 2, Netflix commented: "Seems very thin that Colburn [sic] not having specific knowledge of who called him [in 1994 or 1995] would be the key to the case." (ECF No. 286-11 at 7.)
- Netflix suggested adding Avery's father's quote: "They framed an innocent man just like they did 20 years ago" to the Episode 2 cliffhanger. (ECF No. 286-9 at 8.)
- After reviewing Episode 3, Netflix asked: "Is there anything we can use/show to clarify whether or not the cops had a warrant to search [Avery's] property and allude to the fact that they may have planted something when they were there without permission?" (ECF No. 286-11 at 9.)
- Netflix asked if the producers could "establish a subtle but impactful theme track for the baddies, e.g. Lenk, Petersen, Kratz and certainly for Len Kachinsky and Michael O'Kelly."[12] (ECF No. 286-9 at 36.) Netflix also labeled the scene where lead investigator Tom Fassbender called Dassey's parents and asked them to make him take a plea the "perfect moment for 'bad guy theme.'" (*Id.* at 64.)

[12] Attorney Kachinsky and private investigator O'Kelly worked on behalf of Brendan Dassey (Avery's nephew), who was also criminally charged in connection with Halbach's murder. *See* John Ferak, *Kachinsky, O'Kelly Paid $15K in Dassey Defense*, POST CRESCENT (Sept. 4, 2016, 6:03 PM), https://www.postcrescent.com/story/news/2016/09/04/kachinsky-okelly-paid-15k-dassey-defense/89763170/.

- Commenting on Episode 5, Netflix described a shot of Avery "looking a little smug," and suggested it "might be better to use a different shot." (ECF No. 286-12 at 3.)

Once again, most of these script notes fail to move the needle on actual malice. Implying the Averys were a happy family is not the same as implying that Colborn planted evidence. Similarly, underscoring Colborn's tenuous connection to Avery based on the 1994 or 1995 phone call has nothing to do with implying a frame-up. That Netflix wanted to use Avery's father's quote as a cliffhanger does not prove that it intended to imply the truth of that quote. Asking if the producers had anything that could "allude to the fact that [the cops] *may* have planted something" demonstrates that Netflix only wanted to imply the *possibility* of a frame-up and, even then, only evidence-permitting. And suggesting using theme music for characters other than Colborn and removing a shot of Avery looking smug have no bearing on whether Netflix intended the defamatory implication Colborn alleges.

The one piece of evidence that raises an eyebrow is the creative team's suggestion to include a cliffhanger that "makes it clear that in the next episode the cops are going to seek revenge." (ECF No. 286-9 at 5.) Although "seeking revenge" does not necessarily entail executing a frame job, it does sound in that register. And while the note does not explicitly name Colborn, it requires no great logical leap to figure he is one of the referenced "cops." But given this note's lack of specificity, it falls short of clear and convincing evidence that Netflix intended the defamatory inference Colborn has drawn. Even if one gets past this burden of proof issue, two related problems conclusively foreclose Colborn's claim at summary judgment.

First, just as private communications can illuminate ulterior, defamatory motives, so too can they undercut allegations of defamation. In this case, an email exchange between Del Deo and Cotner provides considerable insight into Netflix's state of mind and undercuts the inference of defamatory intent:

> DEL DEO: In this sequence, it feels like Jerry Buting, on an almost definitive basis, is accusing the officers. Although I think the officers have the strongest motive, I think Jerry's statement come[s] across a[s] fact[….] [T]hey thought, for sure, [']we're going to make sure he's convicted.' It may be worth soften[ing] his statement so it doesn't come across so subjective.
>
> COTNER: I am kind of worried that this note goes contrary to the direction we've been pushing [the producers] in. I've been under the impression that we are desperate to say that someone else could have done it. I'm afraid that if we tell them to soften something it

> is going to really confuse the filmmakers. Is there a specific element that you think is overly subjective? I don't think subjective is necessarily bad, but if it is completely unfounded then you might be right.
>
> DEL DEO: I think the statement as [Buting] currently communicates it comes across, to me, as a matter of fact the officers did it (as oppose[d] to highly likely they did it). In other words, I think if [Buting's] statement involving the officers can come across as a highly possible/very likely scenario (since the officers had a very strong motive to kill Steven) it would be convincing that someone else, most likely one of/some of the officers were involved. I think we're saying the same thing. However, I just wanted to make sure [Buting] isn't saying the officers killed as a matter of pure fact since there's no physical evidence to really prove the officers were there, rather just very strong motive. Take a look at [Buting's] statement again and see if you agree.
>
> COTNER: I think it is a really valid point but I would rather leave it for now – it is something we can always pull out later, but I am so happy that they finally have a point of view. I hope people know that it is just a theory …"

(ECF No. 330-1 at 50-51.) In this conversation, two of the four members of Netflix's creative team express an affirmative desire to exclude unfounded allegations. Cotner also expresses his hope that viewers know the frame-up accusation "is just a theory." In *Saenz*, the Seventh Circuit held that similar internal communications "tend[] to support the defendants' contention that they did not intend or believe that" their publication contained the complained of defamatory implication. *Saenz*, 841 F.2d at 1319. In other words, Del Deo's reluctance to include a statement that conforms with his personal beliefs but lacks substantiation undercuts the idea that the "seek revenge" quote proves defamatory intent. The same goes for Cotner's "just a theory" remark.

In addition, as a matter of law, Netflix exhibited actual malice only if it intended to imply a defamatory, *materially false*, and unprivileged statement. But even if Netflix intended to imply that Colborn planted evidence, Colborn has no evidence that Netflix knew that statement to be false. "[K]nowledge of falsity held by a principal cannot be imputed to its agent." *Mimms v. CVS Pharmacy, Inc.*, 889 F.3d 865, 868 (7th Cir. 2018) (citing *Sullivan*, 376 U.S. at 287). No one on Netflix's creative team ever spoke to anyone depicted in *Making a Murderer*. (ECF No. 269 at 18.) They never even watched the raw trial footage, instead relying solely on the cuts the producers provided. (*Id.*) Colborn himself admitted under oath that those who did not attend Avery's criminal trial could not have known what occurred there, including former Assistant District

Attorney Michael Griesbach, who has written three books on the subject. (*Id.* at 19.) By that logic, a handful of Netflix employees with no legal education and limited exposure to trial testimony cannot possibly have understood the intricacies of the case.

Unhappy with the legal implications of his own sworn testimony, Colborn argues that Netflix assumed the risk of a defamation suit when it published *Making a Murderer* without a thorough factcheck. This misstates the law. A publisher is "under no obligation to check [a producer's] facts at all, unless something blatant put[s] them on notice that [the producer] was reckless about the truth." *Saenz*, 841 F.2d at 1319 (quoting *St. Amant*, 390 U.S. at 731-32). In *St. Amant*, the United States Supreme Court collated a list of warning signs that trigger a publisher's duty to investigate:

> Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

390 U.S. at 732. Here, Colborn has failed to prove the existence of any such improbabilities or inconsistencies. He has not even managed to show that the producers bore him ill-will, and that, in and of itself, is insufficient notice under *St. Amant*. *See Saenz*, 841 F.2d at 1319.

In the end, Colborn's turn in *Making a Murderer* may not have been to his liking, but that does not make it defamatory. Few aspire to enter the cultural zeitgeist on such controversial terms. That possibility, though, is a necessary byproduct of the freedom of press that the First Amendment protects. If media could portray us only at our best, we would be a country of antiseptic caricatures, and less intelligent for it. We have not sunken so low just yet.

II. Colborn's Intentional Infliction of Emotional Distress Claim Also Fails.

Colborn also seeks to recover for Defendants' alleged intentional infliction of emotional distress. Under Wisconsin law, this claim requires proof of four elements: "(1) that the defendant's conduct was intentioned to cause emotional distress; (2) that the defendant's conduct was extreme and outrageous; (3) that the defendant's conduct was a cause-in-fact of the plaintiff's emotional distress; and (4) that the plaintiff suffered an extreme disabling emotional response to the defendant's conduct." *Rabideau v. City of Racine*, 627 N.W.2d 795, 803 (Wis. 2001) (citing *Alsteen v. Gehl*, 124 N.W.2d 312 (Wis. 1963)). But there is no reason to exhaustively engage each

of these predicates. "[P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'" *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). Colborn failed to establish actual malice in his defamation case, so his intentional infliction of emotional distress claim likewise cannot survive.

CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendant Netflix, Inc.'s Motion for Summary Judgment, ECF No. 268, is **GRANTED**.

IT IS FURTHER ORDERED that Defendants Laura Ricciardi's, Moira Demos', and Chrome Media LLC's Motion for Summary Judgment, ECF No. 282, is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff Andrew L. Colborn's Motion for Partial Summary Judgment, ECF No. 284, is **DENIED**.

Dated at Milwaukee, Wisconsin on March 10, 2023.

s/ *Brett H. Ludwig*
BRETT H. LUDWIG
United States District Judge

Applicant Details

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JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 6, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The University of Chicago Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

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June 23, 2023

Judge Stephanie Dawkins Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am a rising third-year JD/MBA at the University of Chicago and a United States Air Force Veteran interested in clerking in your chambers for the 2024–25 term. As a committed public servant, I believe a clerkship would give me the opportunity to explore a legal career and gain crucial, service-oriented mentorship that will enhance my advocacy skills. I am also particularly interested in the legal questions in a district and in the professional landscape specific to the Midwest. The appellate judiciary is particularly of interest for both the variety of cases seen as well as the breadth of techniques required in the analysis. The questions the Sixth Circuit sees are challenging and varied—the variety and novelty strike me as analytically very appealing. My experience last summer confirmed by goal of using my new legal and quantitative skills in service to my adopted home in the Midwest. Your professional experience stands out to me. Because I ultimately hope to continue public service through state and federal executive branches, it would be great to learn of your experience in the USAO's office.

I offer a proven record of leadership, collaboration, and decision-making that I gained through my professional experiences and my seven years of service in the Air Force (Q13B3B). At the City of Chicago's Office of the Mayor, I managed multiple executive programs including one using structures developed during the height of the COVID pandemic to set up Chicago's response to Monkeypox. My personal favorite task was using my legal research skills to assist Chicago's Federal Advocacy unit, examining both the Bipartisan Infrastructure Law and the CHIPS+ Act. By analyzing both Acts with respect to Chicago's existing capabilities, I was able to highlight billions of dollars that the City of Chicago could make a competitive campaign for. As a research assistant at the law School, a specific interest in the legal interactions between political sovereigns led to a project where I helped to examine takings under the Enclave Clause; at Booth I edited a forthcoming book exploring legal, economic, and moral issues implicated in end-of-life care and decision-making. As a flight commander in the Air Force, I led a 120-member flying organization made up of both students and instructors.

I have submitted my resume, writing sample, Law School transcript, and letters of recommendation from Professors Bridget Fahey, Alison Gocke, and Karl Muth. Thank you for the time and for the consideration.

Sincerely,

Jason Shain

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EDUCATION

THE UNIVERSITY OF CHICAGO BOOTH SCHOOL OF BUSINESS **Chicago, IL**
Master of Business Administration *September 2021 - June 2024*

- Concentration: Behavioral Science
- Activities: Co-chair, JD/MBA Association; Net Impact Board Fellow–Illinois Legal Aid Organization; Admissions Fellow–Campus Visit Program

THE UNIVERSITY OF CHICAGO LAW SCHOOL **Chicago, IL**
Juris Doctorate *September 2021 - June 2024*

- Activities: Student Body President, 2022-2023; Law School Veterans President, 2023-2024; Member, University of Chicago Law Review; Dean of Students Advisory Board; Choreographer, Law School Musical

THE UNIVERSITY OF CHICAGO **Chicago, IL**
Bachelor of Arts with Honors, Theater and Performance Studies *September 2008 - June 2012*

- Honors: Dean's List 2008-2012 (top 20%)

EXPERIENCE

BOSTON CONSULTING GROUP **Chicago, IL**
Summer Consultant *June 2023 - August 2023*

CITY OF CHICAGO, OFFICE OF THE MAYOR **Chicago, IL**
Mayoral Fellow *June 2022 - August 2022*

- Selected as 1/20 out of 200+ applicants for Mayoral Fellowship Program; designed and led City of Chicago executive policy action, submitted two new ideas focusing on economic development and City-wide composting for Mayoral staff consideration
- Crafted City of Chicago's response to Community Reinvestment Act; analyzed draft federal rule changes, earned Mayoral signature on response calling for increased equity to FDIC/Federal Reserve/Comptroller of the Currency
- Shaped City's Monkeypox emergency team; interfaced with 50+ City employees including four Commissioners, decreased City's response time by half

UNITED STATES AIR FORCE, 966th AIRBORNE AIR CONTROL SQUADRON **Tinker Air Force Base, OK**
Flight Commander | #1/6 Flight Commanders | #6/42 Captains *February 2020 - February 2021*

- Led staff of five direct and 43 indirect personnel; responsible for training and development for 88 students; analysis of educational protocol led to 40% increase in program success metrics
- Implemented new training program and future execution plan for 2,000-member wing; oversaw three major program revisions resulting in a 35% decrease in time to completion
- Built accessible, real-time scheduling and tracking products for squadron, increased student progress through acquisition pipeline efficiency by 300%

Assistant Flight Commander *August 2018 - February 2020*

- Acting flight commander of 31-member flight; managed schedule for flight members over 1,126 events and 209 training records
- Updated training protocol, leading to 25% decrease in student program completion time despite manning at 45% required staff
- Elevated out of 2,500 personnel for role in strategic planning sessions developing USAF Command and Control future operations, techniques, and equipment

Evaluator Air Battle Manager | #1/7 weapons instructors *August 2017 - February 2021*

- Recognized as top-ten performer in two-week exercise as mission planning cell chief; supervised 12-member team to plan 20 separate E-3 missions integrating seven total USAF squadrons totaling 392 members

UNITED STATES AIR FORCE, 960th AIRBORNE AIR CONTROL SQUADRON **Tinker Air Force Base, OK**
Squadron Executive Officer | Instructor Air Weapons Officer | #2/137 lieutenants *July 2016 - August 2017*

- Selected for job two years ahead of career timeline; advised squadron commander on leadership decisions for 224-member squadron; assisted in building operational plan

Air Weapons Officer *April 2015 - August 2016*

- Flew 325 combat hours directing 1,300 aircraft and orchestrating transference of 8.5M lbs of fuel

INTERESTS

- Marathons (current favorite: Chicago), houseplants (largest: *Aloe Vera*), wine (WSET Level II)


THE UNIVERSITY OF
CHICAGO

THE UNIVERSITY OF CHICAGO

Name: Jason Reuben Shain
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University of Chicago Law School

Degrees Awarded

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Degree Honors: With General Honors
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Academic Program History

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Start Quarter: Autumn 2021
Current Status: Active in Program
Three-Year J.D./M.B.A.

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University of Chicago
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Bachelor of Arts 2012

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Lior Strahilevitz	3	3	177
LAWS	30211	Civil Procedure Emily Buss	4	4	177
LAWS	30611	Torts Adam Chilton	4	4	179
LAWS	30711	Legal Research and Writing Alison Gocke	1	1	178

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Jonathan Masur	4	4	177
LAWS	30411	Property Aziz Huq	4	4	174
LAWS	30511	Contracts Douglas Baird	4	4	173
LAWS	30711	Legal Research and Writing Alison Gocke	1	1	178

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Alison Gocke	2	2	178
LAWS	30713	Transactional Lawyering Joan Neal	3	3	177
LAWS	40101	Constitutional Law I: Governmental Structure Bridget Fahey	3	3	177
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	177
LAWS	57507	Managerial Psychology Ayelet Fishbach	3	3	179

Summer 2022

Course		Description	Attempted	Earned	Grade
BUSN	30000	Financial Accounting J Douglas Hanna	3	3	B
BUSN	33001	Microeconomics Ram Shivakumar	3	3	B+

Honors/Awards
The University of Chicago Law Review, Staff Member 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
BUSN	31001	Leadership: Effectiveness and Development Robert Ward Vishny	0	0	P
BUSN	33050	Macroeconomics and the Business Environment Erik G Hurst	3	3	A-
BUSN	36106	Managerial Decision Modeling Varun Gupta	3	3	B
BUSN	37000	Marketing Strategy Bradley Shapiro	3	3	A
BUSN	41000	Business Statistics David Mordecai	3	3	B+
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Winter 2023

Course		Description	Attempted	Earned	Grade
BUSN	38101	Persuasion: Effective Business Communication Hal Weitzman	1	1	A-
BUSN	38119	Designing a Good Life Nicholas Epley	3	3	B+
LAWS	43280	Competitive Strategy Eric Budish	3	3	181
LAWS	53308	Food Law Omri Ben-Shahar	3	0	
LAWS	81002	Strategies and Processes of Negotiation George Wu	3	3	183
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Date Issued: 06/08/2023

THE UNIVERSITY OF CHICAGO

Name: Jason Reuben Shain
Student ID: 10389579

University of Chicago Law School

Spring 2023

Course		Description	Attempted	Earned	Grade
BUSN	31702	Leadership Effectiveness and Development (LEAD) Lab Robert Ward Vishny	3	0	
BUSN	33305	The Firm and the Non-Market Environment Marianne Bertrand	3	3	A
BUSN	38102	Persuasion II Hal Weitzman	1	1	A
LAWS	42603	Corporate and Entrepreneurial Finance Steven Neil Kaplan	3	3	178
LAWS	43248	Accounting and Financial Analysis Philip Berger	3	3	177
LAWS	94110	The University of Chicago Law Review	1	1	P
Req Designation:		Meets Substantial Research Paper Requirement Anthony Casey			

End of University of Chicago Law School

Karl T. Muth, JD, MBA, MPhil, PhD
The University of Chicago Booth School of Business
karl.muth@chicagobooth.edu

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write in support of Jason Shain as you consider his application for a clerkship position.

You may be wondering, rightly, why a faculty member who did not instruct Jason at The Law School is sending a letter. Permit me to explain.

I'm an interdisciplinary law-and-economics scholar at the University of Chicago and Jason was my research assistant as I worked on a manuscript (book to be released in 2023) at the intersection of law, history, philosophy, and public policy; this work included engaging with a variety of complex arguments, interpreting (and sometimes polishing or challenging) my thinking about precedent and older lines of argument, and a constant excavation and appraisal of footnotes and citations to ensure they supported the thrust of the argument on offer. Jason did each of these tasks superbly, not only to a high standard of work but to a high standard of communication, discretion, and genuineness that we unfortunately utterly fail to create (or even improve much, frankly) in law schools. I would put Jason among the very top students who have served as research assistants to me in the past thirteen years, and it's a high bar as I've been perennially and undeservingly fortunate in recruiting top research graduate students like Jason. I do not write these letters as a matter of course and often politely decline when asked to recommend someone; however, Jason's ability, ethic, and engagement with complex argumentative writing suggest to me he's peculiarly well-suited to this work and could be an especially valuable asset to you.

Perhaps most relevant, and I suspect truly differentiated from many of your other clerkship applicants, Jason isn't a shotgun-approach circuit-agnostic applicant. He's spent time living in your appellate jurisdiction's footprint and is thoughtful about issues specific to that geography and its jurisprudential history. I've learned Jason has a keen interest (in my view, a prescient interest) in cases like Ute Indian Tribe v. Lawrence and United States v. Abouselman, which I doubt are the last of their kind, with mineral rights, water rights, and other rights questions subject to either natural or imposed resource constraints being pertinent both regionally and nationally for decades to come.

I have taught at the University of Chicago, where I am also an alumnus, for a few years and, prior to this, taught at Northwestern University for over a decade, where I taught economics, law, and public policy; I am still affiliated with the School of Law at Northwestern (now the Pritzker School of Law). All this to say that I've seen many exceptional law students over the years and have had the privilege of instructing many of them first-hand in the classroom or in some more casual mentorship sense or as to clinics or journals; Jason is in the top single digit percentages of these students and in clarity in editorial and writing work is among the top students I can count on one hand. There is nothing I have seen in his ability, manner, or temperament that would give me a moment's pause when I think about his work in a clerkship role. My frequent coauthor, Nancy Jack (now Assistant Attorney General, but for many years Law Clerk at the Illinois Supreme Court and an exceptionally-talented thinker and writer), is someone with whom I'll soon publish another article (accepted, forthcoming) and working with her has acquainted me with what it's like to work with a very top writing clerk; Jason is a tadpole in that ecosystem, but as someone who's seen and worked with bullfrogs, I think Jason has some real bullfrog potential.

Please don't hesitate to contact me if you have any questions about Jason's performance under me or my impressions of him as a person and future practitioner; I'd be eager to speak with you.

Kind regards,
Karl T. Muth

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write to support Jason Shain's application for a clerkship in your chambers. I taught Ja-son as his first-year legal research and writing professor. Over the course of the year, I came to know Jason as a mature and thoughtful person, someone who is wise beyond his current position as a law student. Jason served in the United States Air Force for six years before coming to law school; and during his time in school, he has consistently sought out opportunities to support the law school and the broader Chicago community. It is clear to me that Jason is destined for a career in public service. I believe a clerkship in your chambers would set him up well for success in this field.

Jason was the very first student I met at the University of Chicago School of Law. It was Orientation Week, and the school had arranged an event for the students to meet each other and some of their professors, including their legal research and writing professors (known as the "Bigelow fellows" at the University of Chicago). Most of the students mingled amongst themselves. But Jason, not one for artificial barriers, walked over to the Bigelow fellows and introduced himself. When I mentioned my name, Jason immediately recognized me as his Bigelow fellow. Jason then called over his classmates (who were in the same legal writing section) and introduced me to them. In an instant, Jason had transformed a banal event into an incredibly meaningful moment for me: it was the first time I got to meet my students, a group of students that would be my first students as a young professor. This class has come to mean quite a lot to me; and I believe no small part of that is due to this introduction that Jason facilitated, which occurred outside of the classroom and before the rigors of law school had set in, allowing us to get to know each other as people first.

I tell this story because I believe it epitomizes well how Jason approaches the world. The students were only in Orientation Week, and Jason had already befriended all of his classmates and gotten to know his professors. He seizes every opportunity available to meet new people. He connects with people not for his own benefit, but so that he can introduce his peers and friends to new acquaintances. He builds these connections across groups, across schools, across fields. In short, Jason is, as Aristotle would say, a social animal.

It came as no surprise, then, when Jason became involved with every aspect of the school. He threw himself into leadership positions at the law school, serving as Student Body President, as the President of the Law School Veterans group, as the head of the JD/MBA student group for the Booth School of Business, and on the Dean of Students Advisory Board. He was at every single event: bagels and coffee every Wednesday morning; public interest service events in the evenings; rehearsals for the Law School Musical in the afternoons. It became a joke, although said more for its truth than its humor, that if someone wanted to know what was going in the school, they should consult Jason.

It was clear to me that Jason was involved in the school to this degree because he cares deeply about his community. Because Jason was present at every Wednesday coffee, he would notice if a student who had regularly attended was suddenly missing. He was on the Dean of Students Advisory Board because he kept his ear to the ground, listening for any sign that students were unhappy and that more could be done to support them. He led the JD/MBA student group to ensure that joint degree students felt integrated at both the law school and the business school. Amidst all of this, I know that Jason went through a very difficult personal hardship in his first year of law school. Yet Jason did not share this with his peers. He believed it was more important to listen to others' troubles than share his own.

Jason has told me many times of his desire to go into public service. We discussed his de-cision to spend a summer at the Mayor's office in the City of Chicago, a decision that required him to give up a lucrative option in Washington, D.C. Jason felt that working in the Mayor's office would enable him to be closer to the people, learning how government operated on the ground in a city that has been home to him for many years. There is no doubt in my mind that Jason will take this knowledge, and all of the knowledge he has acquired in his many years of service inside and outside of the law school and apply it to becoming a leader in the world.

I realize this is a somewhat unusual letter of recommendation. Most times, I try to convey a sense of the person's performance as a student and their work product. Jason is a competent student and will be a competent attorney. But I believe the qualities that make Jason stand out are his leadership skills, his ability to connect with others, and his clear sense of duty and obligation to others. These are skills that will not only make Jason a good clerk but will make him an outstanding lawyer in the old-fashioned sense of the word: a lawyer-statesman. I encourage you to consider his application.

I would be happy to discuss Jason at any time. Please feel free to contact me via email at agocke@law.virginia.edu or via my cell phone at 443-472-2036.

Sincerely,

Alison Gocke
Associate Professor of Law

Alison Gocke - agocke@law.virginia.edu - (434) 243-8545

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Bridget Fahey
Assistant Professor of Law
The University of Chicago Law School
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June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am delighted to recommend Jason Shain for a clerkship in your chambers. Jason was a student in my Constitutional Law I course and I was so impressed by his in-class performance—including on my challenging cold calls—that I recruited him as a research assistant even before the quarter ended. He excelled in that role. His performance as my research assistant and in class, his rich pre-law school experiences as a veteran of the United States Air Force, and his lovely personality give me the confidence that Jason would be a terrific law clerk. It has been my genuine pleasure to teach and get to know him. Jason has a sterling career ahead of him.

I taught Jason in my 1L course Constitutional Law I: Government Structure. He made an impression from the very first day. For our first session, I assign only the text of the U.S. Constitution, and I structure our in-class discussion around aspects of the Constitution that students find notable or surprising. I remember being particularly struck by the creativity of Jason's reflections about how the Constitution divides and integrates powers over taxes, expenditures, and currency. It was no surprise later in the quarter when Jason aced my cold calls—he reads with care, he speaks with the perfect blend of confidence and intellectual humility, and his analysis is not only persuasive, but also creative and generative. On the strength of Jason's in-class performance, I hired him as a research assistant. Jason's work was terrific: elegantly written, comprehensive, and characteristically insightful.

Jason's life before law school is as impressive as his performance here. He is older than your average law student, having served for six years as an officer in the Air Force in a series of increasingly significant roles, including as a flight commander. Given the leadership skills Jason developed in the Air Force, it is no surprise that he has been chosen by his peers as the law school's Student Body President. But Jason's life before law school also seems to inform how he handles the less formal side of the law school experience. Jason has been calm, cool, and collected every time I've seen him—whether at the relaxed beginning of a quarter or its stressful end. Having confronted genuinely high-pressure and high-stakes challenges before, Jason is distinctively capable of handling the pressures of law school with poise and perspective. I'm confident the same will be true of his work for whichever judge is lucky enough to hire him.

I have also been impressed by Jason's wide-ranging interests and ambitions. Jason is earning an MBA from our Booth School of Business alongside his JD, and perhaps for that reason he moves easily between conversations about doctrinal legal topics and broader public policy issues, including the relationship between political systems, governmental institutions, and the private sector. Jason chose to spend his first summer with the City of Chicago, where he worked on litigation and policy matters ranging from the implementation of the federal COVID-19 aid package to the City's response to the monkeypox outbreak. He aspires to a career in public service, likely in his home state of New Mexico—perhaps moving between policy and litigation roles—after he finishes his clerkships. I am completely confident he will be a leader in any community he chooses to serve.

Finally, I'd be remiss not to note that Jason has a truly lovely personality. He's thoroughly professional; he's funny and friendly; and he has a genuine core of kindness. He frequently asks after my family, remembering even small details shared months earlier in casual conversation. I've also been struck how often Jason finds chances to sing others' praises—from students in his class who made contributions that he found generative to those family and friends who have helped him succeed. Having worked as a law clerk myself, I'm sure that Jason would be a delightful co-clerk: hardworking, composed even when the intensity heats up, and quick to support the team effort—all with a smile on his face.

As you can tell, I think very highly of Jason. I hope you meet with him—you will not be disappointed. Please let me know if I can provide any further help.

Sincerely,
Bridget Fahey

COVER MEMO SHEET FOR WRITING SAMPLE

To Whom it May Concern:
From: Jason Shain
Re: Writing Sample, *Come from Away: State Standing with Respect to Migrant Transport*

The attached writing sample is the submission draft of my online essay for the *University of Chicago Law Review*. This was written during the summer between my first and second years in the University of Chicago JD/MBA program, after a full year of law school.

The *University of Chicago Law Review Online* is the youngest part of the *Law Review*. It was designed as a way for the *Law Review* to reach general interest readers everywhere and to adapt to modern media. Its goal is to allow for increased student publishing, to develop ambitious ideas for future articles and symposia, and to provide a place for modern, short-form scholarship. Each online piece focuses on a contemporary issue or recent key case.

The basis for this memo was the ongoing transfer of migrants by Governor Ron DeSantis to Martha's Vineyard. The contemporary nature of this action combined with my interest in the legality of government policies and decisions made this an extremely exciting topic for me.

10/09/22 U. Chi. L. Rev. Online * 1

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COME FROM AWAY: STATE STANDING WITH RESPECT TO MIGRANT TRANSPORT

Jason Shain

***

On a Wednesday in the middle of September 2022, two planes departed a private airstrip in Florida bound for Martha's Vineyard Airport (KMVY). These planes carried approximately fifty migrants who were not aware of the destination. The next day Florida Governor Ron DeSantis claimed credit for the act as an attempt to draw attention to increased border migration. In late September 2022, *Alianza Americas v DeSantis (2022)* was filed as a class action including, among other causes of action, violations of the Supremacy Clause, the Fourth and Fourteenth Amendments, and the Civil Rights Act of 1964.

Several Constitutional concerns are implicated in *Alianza Americas*. Disputes between the multiple States implicated in the transport of migrants is absent, however. Outside the Plaintiffs' argument that Defendants' actions directly "conflict with" and "attempt[ ] to supplant[ ] *federal* immigration law," no governmental entity conflict is mentioned. Neither any states nor any cities have joined the suit as parties or filed a separate action. *Alianza Americas* provides a useful illustration of under what circumstances a government body has standing to sue another government body. Because *Alianza Americas* concerns individual violations of foreign nationals, states may not be able to directly join. This essay seeks to use *Alianza Americas* to explore implications of state sovereignty with respect to the non-consensual transfer of foreign nationals to show that states may be able to act under theories of sovereignty.

I. Ability of a City or State to Sue

Normally, both states and cities have limited ability to sue in their own regard. In *City of Trenton v. New Jersey (1923)*, the Supreme Court described cities as the "creature of the state." *City of South Bend v. South Bend Common Council (2017)* demonstrates the common understandings among federal courts that a state and *all* its creatures are a unit. *State of Illinois v. City of Chicago (1998)* clarifies both the legal relationship between cities and states as well as states' ability to seek legal action. Cities exist under the color of state law and states, in turn, cannot sue in their own right as a state is not a person. The question then becomes under what circumstances a governmental body can pursue legal remedy.

There are a few areas where courts have upheld various governmental entities' rights to sue. One is where there is a demonstrated zone of interest in protection or regulation and there is an injury in fact. In *City of Seattle v. State (1985)*, the Supreme Court of Washington applied a both-and test in analyzing whether the City of Seattle had standing to pursue annexation of unincorporated

land. The city was found to have interest on the behalf of residents and therefore standing to sue.

Another right to sue, specifically applicable to legislatively created governmental bodies, is where an enabling act *specifically* includes a cause of action, as in *City of New York v. State (1995)*. It is possible that a state looking to join *Alianza Americas* could lack specific statutory authorization but may be able to argue for zone of interest and injury. Plaintiffs' claim asserts "intentional availment of the benefits of the Commonwealth [of Massachusetts]" through the towns of Martha's Vineyard. At the same time, the class of individuals named in *Alianza Americas* is not one to which a state could easily join.

II. Lawsuits Under a Parens Patriae Theory

State of Illinois highlights a difficulty in a hypothetical state joining *Alianza Americas*. A state is a governmental entity and therefore not a person. In *State ex rel. Harrell v. Board of Education (1989)*, the Supreme Court of Ohio drew an important extension to the non-personhood of a state: a state cannot sue *as* a class member. This inability removes a potential avenue for a state or its creatures to join *Alianza Americas*.

An important avenue may remain open to a governmental body: parens patriae. Parens patriae is the common-law right for a sovereign to sue on behalf of their subjects. In *Hawai'i v. Standard Oil Co. (1972)*, the Supreme Court traced parens patriae and found that in the United States the royal prerogative behind parens patriae passed to the states. The Supreme Court further found that the United States' version of parens patriae is expanded over the English version—here, parens patriae allows states to sue to prevent or repair harm to "'quasisovereign' interests." It is asserted in *Hawai'i* that states can sue on behalf of their citizens. *Alianza Americas* somewhat complicates that doctrine as the migrants sent from Florida to Massachusetts are not citizens. States *are* able to sue to prevent discrimination *against their own citizens* as indicated in *Commonwealth of Pennsylvania v. Flaherty (1975)*. The actions alleged in *Alianza Americas* raise an interesting question of what rights, if any, a state has to protect non-citizens. There is active debate around that question. The Supreme Court itself has been noted for ambivalence of the applicability of certain rights, such as Due Process, to non-citizens.

III. Legal Standing Based on Non-Consensual Commitment of Resources

The complaint in *Alianza Americas* alleges that the Defendants acted "under color of state law." That phrase is crucial to the claim that Defendants acted against Plaintiffs in a way that violated constitutional and statutory rights. If the Defendants did not act under authority of the state of Florida, the act itself would be simply unlawful. There are open questions in Florida as to if the transfer was authorized. For now, however, Defendants are claiming state authority to continue the transfers.

Certain constitutional and statutory rights are likely not within scope when considering interaction between separate sovereign entities. The State of Massachusetts, for instance, may not have any zone of interest or injury when narrowly considering the possibility that the Defendants targeted individuals for discriminatory treatment due to national origin. At the same time, a state to where migrants are sent may view the act as injurious to either its sovereignty as state-qua-state or as injury to *citizens of the state*.

There are two possibilities for the transportation of migrants from Florida to Massachusetts. Either Massachusetts and Florida agreed to the transportation, or they did not. If they did, they may require congressional approval. In this instance, it seems that there was no agreement. Where there is no agreement, sovereignty may be implicated, but sovereignty is known as an "elusive" concept. Parens patriae is rooted in "quasisovereignty." At the same time, courts are reticent to interfere with state sovereign authority except in so far as the Constitution has diverted their powers to Congress. A non-agreed-to transfer of individuals in distinct need of resources may implicate state sovereignty. In a system where each state is viewed to be on equal footing with every other, non-consensual commitment of another state's resources may implicate sovereignty concerns. If Massachusetts, for example, agreed to house migrants on Florida's behalf and received congressional approval, Massachusetts could be viewed as consenting to utilize its own resources as it so chooses. This case seems to be one where multiple states have not consented to potentially ongoing transfers of migrants. The states where migrants are being relocated may be able to claim that their resources are being diverted without their consent. If that is the case, one state may be viewable as acting against the sovereignty of another and therefore as an injury against the state itself. In such an instance, the Supreme Court has demonstrated an interest and ability to reconcile those states' conflicting interests.

Parens patriae may even be implicated in considering a state's abilities to protect the resources of its citizens. A state may view the commitment by another state of the first state's resources as an act affecting the citizens of the state. If that is the case, that state could argue that by requiring a recommitment of state resources by the actions of another state, citizen interests are harmed. In *Maryland v. Louisiana (1981)*, the Supreme Court affirmed the ability of a state to act as a representative of its citizens where the general population of the state is affected in a substantial way. *Maryland* concerned an imposition of an in-state tax which economically impacted the citizens of a neighboring state. Similarly, it is possible that the act of non-consensual migrant relocation causes economic disruption in a state targeted for relocation. In the instance of either an injury against the state-qua-state or of a parens patriae action on behalf of the citizens of the state, a state may be able to argue that injury and zone-of-interest are met. Meeting injury and zone-of-interest are the benchmarks a state would need to cross to demonstrate standing.

It is worth noting that a state's hypothetical choice to take legal action against Florida or citizens of Florida to include Governor DeSantis would give that action significant trenchancy. As a controversy between multiple states, or, at a minimum, between one state and a citizen of another, the Supreme Court would gain original jurisdiction. For Massachusetts, for instance, to have standing would require a finding that Massachusetts could stand on behalf of either the transported migrants or on behalf of the citizens of Massachusetts. It is very possible that the former is a difficult path. An extreme assumption that any of the statutory or constitutional violations in *Alianza Americas* are valid as alleged still faces a parens patriae hurdle of suing on behalf of non-citizens. A more traditional injury and zone-of-interest theory implicating resources and sovereignty of the designated state to which migrants were removed may prove more viable.

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COVER MEMO SHEET FOR WRITING SAMPLE

From: Jason Shain
Re: Writing Sample, *Intertaste Commerce: Protecting America's Geographic Indicators*

To Whom it May Concern:

The attached writing sample is my seminar paper from LAWS 53308: Food Law, a class at the Law School examining issues related to food law and food policy. The culminating event for the class was a 6000–7500 word research paper examining a topic related to those covered in the class. All research and writing is entirely my own.

The purpose of this paper is to explore how certification marks are used to protect geographic indicators in the United States. It uses comparative techniques to argue that broader, property right protection may be more optimal for a specific subset of goods that include quality as well as geographic restrictions.

Jason Shain
June 2, 2023

INTERTASTE COMMERCE: PROTECTING AMERICA'S GEOGRAPHIC INDICATORS

INTRODUCTION

Protected Geographic Indicators (PGIs) are goods that have an association to their place of origin.[1] PGIs are protected worldwide. While differing regimes exist globally to protect PGIs, the goal is largely the same—to allow producers and consumers to adequately communicate the value of a PGI.[2] In the United States, PGIs are protected by certification marks, a specific and limited subset of trademarks as defined by the Lanham Act.[3] They exist to provide protection for those goods where an inherent and valuable aspect of the good is purely descriptive (the *geography*) and therefore otherwise cannot be protected.[4] For most goods, this reflects an efficient use of market dynamics to ensure that producers are able to reach the market with their goods and be appropriately compensated. It also ensures that consumers can adequately value those goods based on the known aspect of the good's geographic origin. However, there is a smaller subset of goods that certification mark protection may not be adequate for. Certification marks in the United States are used to protect all PGIs. This includes those for whom the PGI is inclusive of protected quality or process. It is difficult and rare for PGIs to attain broader protection. The hurdles are challenging and made more so by the niche market for many PGIs with quality aspects. The result is that the market is hindered. Consumers seeking a good with a PGI may not be fully aware that the PGI governs more than origin and therefore may not be able to fully value that good. Producers are then not able to be appropriately rewarded for the time, process, and manner through which that good is produced. This paper seeks to argue that decreasing the difficulty for PGIs while also protecting quality or process will allow the market to function as intended for these specific goods.

Part I of this paper describes and defines certification marks. Part I.A contrasts them with trademarks. Part I.B describes certification marks' purpose as they have been defined by the courts. Certification marks primarily exist to facilitate market access for producers and accurate valuation for consumers. Part II traces the use of certification marks in the United States. Part II.A describes how, for most goods, certification marks create an efficient market. Part II.B describes how within the broad set of certification marks, there is a wide range of applications, from those that protect geography only to those that also protect quality or process. Part II.C describes the European system for PGIs, how it is more akin to trademark protection, and contrasts the European and American systems with respect to market impact. Part III describes why certification marks may not be adequate for protecting some PGIs. Part III.A defines non-discerning consumers and illustrates why certification marks may not allow that type of consumer and producers to properly transact. Finally, Part III.B argues that for those PGIs that protect more than just geography, easing access to trademark protection may allow the market to function as intended.

I. GEOGRAPHIC CERTIFICATION MARKS AS A SUBSET OF TRADEMARKS

The primary legal authority for trademark protection is derived from the Lanham Act.[5] The Lanham Act broadly defines trademarks, creates subsets of protected marks, and describes how and when these marks can be protected as well as when protections for these marks can or must cease.[6] The purpose for the Lanham

[1] In re Nantucket Allserve, Inc., 28 U.S.P.Q.2d 1144 at *2 (T.T.A.B. 1993).
[2] Council Reg. 510/2006, pmbl., 2006 O.J. (93/12) 6.
[3] The Trademark (Lanham) Act of 1946, 15 U.S.C. §§ 1051–1141.
[4] 15 U.S.C. § 1054.
[5] The Trademark (Lanham) Act of 1946, 15 U.S.C. §§ 1051–1141.
[6] *See generally* The Trademark (Lanham) Act of 1946, 15 U.S.C. §§ 1051–1141.

Act is to ensure a well-functioning marketplace both for producers and consumers of goods.[7] This comports with the U.S. Constitution's Patents Clause, granting temporary "exclusive rights" in order to "promote the progress of science and the useful arts."[8] For purposes of this paper, I will be primarily looking at certification marks, a subset of trademarks with particular resonance for the United States' Protected Geographic Indicators (PGIs). Because PGIs are definitionally geographic, their nomenclature is primarily descriptive of their place of origin. Part I.A explains the legal background of certification marks as a subset of trademark law. Part I.B contrasts certification marks and trademarks. Part I.C examines why these marks are created and what marks provide a consumer.

A. The Legal Background of Certification Marks Contrasted with Trademarks.

Certification marks exist as a specific subset of trademarks. Trademarks broadly have two requirements. One is for a good to be "use[d] in commerce"[9] or have a good faith intent to be so used.[10] The other is for the good to be "distinctive."[11] There are four categories of distinctive: "(1) generic, (2) descriptive, (3) suggestive, or (4) arbitrary or fanciful."[12] Each is granted a different level of protection, respectively: non-protectable, protectable with secondary meaning "in the minds of the consuming public," and protected *without* secondary meaning for categories (3) and (4).[13]

Importantly, trademarks statutorily may be refused if they "[consist] of a mark . . . used on or in connection with the goods of the applicant [that] is *primarily* geographically descriptive of them, except as indications of regional origin may be registrable under section 1054 of this title."[14] Normally, this would preclude the use of marks for PGIs—PGIs describe the place of origin of the goods they protect (it would be challenging to describe "Idaho Potatoes" in any other way save potatoes from Idaho). However, section 1054 of the Lanham Act provides that "certification marks, *including indications of regional origin*, shall be registrable under this chapter, in the same manner and with the same effect as are trademarks."[15] This language in section 1054 allows for the creation of certification marks as a tool for protection of PGIs. These marks provide trademark-like protection for certification marks.

For certification marks to stand, one requirement is that the certifying agency maintains control of the mark.[16] The other is that the mark is not discriminatorily applied.[17] Additionally, a mark cannot be used in a way that can be expected to deceptively create an impression in the mind of a consumer.[18] Certification marks are also subject to cancellation if they become "generic,"[19] that is where the mark is seen by the public to "[connote a] 'basic nature of [an article or service]."'[20] These rules in tandem create a schema where a certifying organization functions as a mandatory licensing agency: as long as a registered geographic mark remains both specific and non-deceptively descriptive in the mind of a consumer, a certifying agency *must* certify goods that meet their criteria.

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[7] Kelly Knoll, *Confusion Likely: Standing Requirements for Legal Representatives Under the Lanham Act*, 115 COLUM. L. REV. 983, 985 (2016).
[8] U.S. CONST. ar. I, § 8, cl. 8.
[9] 15 U.S.C. § 1127.
[10] *See* 15 U.S.C. § 1051.
[11] 15 U.S.C. § 1052.
[12] Zatarains, Inc. v. Oak Grove Smokehouse, Inc., 698 F.2d 786, 790 (5th Cir. 1983) (abrogated in part on other grounds by KP Perm. Make-Up Inc. v. Lasting Impression I, Inc., 543 U.S. 111, 121–22 (2004) ("Some possibility of consumer confusion must be compatible with fair use.")).
[13] *See Id* at 790–91.
[14] 15 U.S.C. §§ 1052(e) (emphasis added) (a separate section, §§ (a), held unconstitutional in Iancu v. Brunetti, 139 S. Ct. 2294 (2019)).
[15] 15 U.S.C. § 1054 (emphasis added).
[16] 15 U.S.C. § 1064.
[17] 15 U.S.C. § 1064.
[18] 15 U.S.C. § 1054.
[19] 15 U.S.C. § 1064 (3).
[20] *Zatarains,* 698 F.2d at 790 (quoting Am. Heritage Life Ins. Co. v. Heritage Life Ins. Co., 494 F.2d 3, 10 (5th Cir. 1974)).

The nature of certification marks as a compulsory licensing scheme is similar to, though distinct from, trademark protection which exists as a granted monopoly over an intellectual property.[21] Certification marks provide a way for producers to receive protection for a good which is not protected by trademark. At the same time, certifiers have an affirmative duty to certify *any* good that meets their criteria. Nathaniel F. Rubin describes the difference between certification marks and trademarks as one where trademarks offer protections that sound in property rights while certification marks primarily exist to ensure producers and consumers have an accurate gauge of the market value of a good.[22]

It is possible for certification marks to become eligible for, apply for, and receive trademark protection. Professor Lynne Beresford has determined that this is uncommon.[23] For a certification mark to successfully become a trademark, it requires proof that the geographic indication has developed an attached "secondary meaning"[24] where the public identifies the mark as being tied to something other than merely the "*source or origin* of the goods."[25] An example proving the rule of the rarity of this grant is provided by Hatch chile![26] "Hatch" was successfully granted trademark rights after a twelve-year process. "Hatch" now is attached to both the chile as a product and to the river valley from which it originates (thus proving secondary meaning).[27] It is much more common is for certification marks and trademarks to interact as with Idaho Potatoes where a protected certification mark exists for the potatoes themselves[28] and a separate trademark exists for non-potato products (such as merchandising, mascots, or vehicles).[29]

B. The Purpose of Commercial Marks

Commercial marks "identify the source of [goods] and indicate quality of such [goods]."[30] This identification serves both producers and consumers. Producers receive protection for accurate representation and consumers gain the ability to select "goods of known quality" and avoid deception.[31] Accurate representation by producers and perception by consumers ensures free and fair competition and allows producers to accurately market their goods.[32] Two cases, *Lear Inc. v. Adkins*[33] and *In re Nantucket Allserve, Inc.*[34] illustrate important aspects of the purpose of mark protection. The first shows how enforcement of a mark requires a balance between the limited monopoly granted to a creator and the public good of market competition. The second shows consideration of how consumers perceive certification marks.

i. *Lear, Inc. v. Adkins.*

Lear, Inc. v. Adkins[35] is the leading case interpreting the Lanham Act. It concerned improvements to a gyroscope, invented by the Defendant Adkins.[36] The improvements were discovered while Adkins was

[21] Idaho Potato Comm'n v. M & M Produce Farm & Sales, 335 F.3d 130, 138 (2nd Cir. 2003).
[22] *See generally* Nathaniel F. Rubin, *Missing the (Certification) Mark: How the Lanham Act Unnecessarily Restricts State and Local Governments as Certifiers,* 71 STAN. L. REV 1023 (2019).
[23] Lynne Beresford, *Geographical Indicators: The Current Landscape*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 979, 984 (2007).
[24] E.H. Schopler, *Doctrine of secondary meaning in the law of trademarks and unfair competition*, 150 A.L.R. 1067 (II)(a) (1944).
[25] *Id.* (emphasis added).
[26] HATCH, Registration No. 3391024.
[27] *See Id.*
[28] *See* ID ST § 22-1202.
[29] CERTIFIED GROWN IN IDAHO 100% IDAHO POTATOES, Registration No. 3530137.
[30] DAVID M. EPSTEIN, 1A ECKSTROM'S LICENSING IN FOR. AND DOM. OPS. § 6:1 (2022).
[31] *Id.*
[32] *See, e.g.,* Rubin, *supra* note 22 at 1029 (illustrating how both certification marks and trademarks function to assist consumers and producers accurately value goods in the marketplace).
[33] 395 U.S. 653 (1969).
[34] 28 U.S.P.Q.2d 1144 (T.T.A.B. 1993).
[35] 395 U.S. 653 (1969).
[36] *Id.* at 655.

working for Plaintiff Lear; all gyro-related discoveries contractually belonged to Adkins so long as Lear was licensed to "all ideas he might develop 'on a mutually satisfactory royalty basis.'"[37] The new gyroscope was licensed to Lear while a patent was pending. Five years later when the patent was approved, Lear stated it would not pay royalties and attempted to prove patent invalidity based on the gyroscope being anticipated by a previous patent.[38] The Court in *Lear* considered whether Lear could be estopped from attempting to prove patent invalidity and held that Lear "must be able to avoid the payment of all royalties . . . if [it could] prove patent invalidity."[39]

Lear provides a clear example of a judicial view of the Lanham Act as promoting the public good through innovation. *Lear* elucidates the balancing act that must be considered when evaluating the protections for a mark, that between the "equities of the licensor" and "permitting full and free competition in the use of ideas which in reality are a part of the public domain."[40] *Lear* provides an important consideration for purposes of this paper in recognizing that both "free competition and narrowly limiting monopoly"[41] have useful market purposes. The use of a mark to protect a good should consider how it is enabling the public both to value it and ensure free and fair competition with other, similar goods.

ii. In re Nantucket Allserve, Inc

In re Nantucket Allserve, Inc.[42] is an example of the Trademark Trial and Appeal Board considering what the name of a good may communicate to a consumer. *Nantucket* examined whether a trademark for "Nantucket Nectars" could be refused based on "Nantucket" being "primarily geographically descriptive of the goods of the applicant."[43] The applicant, Nantucket Nectars, was a soft drink manufacturer headquartered and with a research-and-development center on Nantucket though with production and suppliers elsewhere.[44] The board examined whether "Nantucket" was therefore "primarily geographically descriptive." Necessary to this determination is *public perception*, namely whether the public "[believes] that the goods for which the mark is sought to be registered originate in that place."[45] The board found that "Nantucket" was primarily geographically descriptive and upheld the refusal of the trademark.[46]

Nantucket clarifies the role of public perception for geographic descriptors as well as aspects of public perception when evaluating the bundle of attributes that is a good or service. *Nantucket* outlines a test for geographic description. The first part is an obscurity test. That part requires that for a commercial mark to be geographically descriptive it must be "generally known to the American public."[47] The second part is a "goods/place association" evaluating whether the public *believes* the goods to "originate" in that place.[48] Of note, "originate" is defined broadly—the board determined that headquarters and research-and-development can constitute "primary origin."[49] *Nantucket* demonstrates that public perception is paramount when evaluating how a commercial mark should attach to a good. For Nantucket Nectars, "Nantucket" merely described where they were located and was determined to be viewed by the public as such. As a trademark it had to fail as there was no secondary meaning beyond the geographic descriptor.[50]

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[37] *Id.* at 657.
[38] *Id.* at 658–59.
[39] *Id.* at 674.
[40] *Lear*, 395 U.S. at 670.
[41] *Id.* at 677 (Black, J., concurring in part and dissenting in part).
[42] 28 U.S.P.Q.2d 1144 (T.T.A.B. 1993).
[43] *Nantucket,* 28 U.S.P.Q.2d at *1.
[44] *Id.*
[45] *Id.* at *2 (quoting In re Societe Generale, 3 U.S.P.Q.2d 1450, 1452 (Fed. Cir. 1987)).
[46] *Id.* at *4.
[47] *Id.* at *2.
[48] *Nantucket,* 28 U.S.P.Q.2d at *2.
[49] *Id.* at *3.
[50] *Cf.* In re Jacque Bernier Inc., 13 U.S.P.Q.2d 1725, 1727 (Fed. Cir. 1990) (finding that "Rodeo Drive" was *not* seen by the public as a geographic descriptor but as an indicator primarily of quality).

II. GEOGRAPHIC INDICATORS IN THE UNITED STATES

The primary tool for PGI enforcement in the United States is certification marks.[51] Professor Beresford argues that this sort of protection is adequate. Professor Beresford's view is that certification marks guarantee that a specific class of good which consumers perceive as having added value communicates that value, that the regime moves enforcement toward the most interested party, and that contestation of a certification mark can be responsive to changing perception or poor standard enforcement.[52] This paper agrees with Professor Beresford's view for most certification marks. At the same time, there is a small subset of certification marks for which geography does not adequately capture the producer's value. Part II.A examines the use of certification marks as an effective market solution. Part II.B explores two examples where it may not be adequate. Part III.B describes Europe's property-based regime as a contrast with the American system.

A. Certification Marks as an Effective Tool

Idaho's potatoes provide an excellent example of how certification marks provide an optimal solution for most goods. Because it is rare for certification marks to later gain property rights-based trademark protection, most PGIs in the United States are protected as certification marks. These marks require broad certification of goods produced in a prescribed geographic region. For instance, "100% Idaho Potatoes" must be applied to any potato that is grown "100%" in Idaho.[53] 100% Idaho Potatoes are certified by the Idaho Potato Commission (IPC) which in turn was created by the State of Idaho to certify and promote Idaho potatoes.[54]

The IPC is fiercely protective of Idaho's potatoes. Two enforcement cases demonstrate both how a certifying agency can serve as an effective enforcer of certification marks and how judicial conception of certification marks primarily sounds in market functionality. The first case, *Idaho Potato Commission v. M & M Produce Farm & Sales*[55] specifically discusses the market reasoning behind certification marks. The second, *State of Idaho Potato Commission v. G & T Terminal Packaging, Inc.*[56] focuses on ensuring producers and consumers can accurately use labeling to value goods.

In *Idaho Potato Commission v. M & M Produce Farm & Sales,*[57] Defendant M & M had been a packager of Idaho potatoes who, upon being found in breach of the IPC's record-keeping requirements, lost their license for use of the potato certification mark. Despite this, M & M kept using the mark.[58] M & M argued that the IPC could not enforce the mark as the mark was, among other reasons, difficult to certify outside Idaho and did not meet the Lanham Act's purposes for certification marks as only to certify.[59] *Idaho Potato Commission* is largely a procedural estoppel case around M & M's rights to bring those claims—the court found a public interest in the ability to challenge certification marks.[60] For purposes of this paper, however, it is worth focusing on the court's reasoning. The court distinguished certification marks from trademarks, focusing on the latter as a limited monopoly and the former as protection of "a public interest in free and open competition among producers and distributers of the certified product."[61] The court viewed the goal of this protection as "[facilitating] consumer expectations of a standardized product, much like trademarks are designed to ensure that a consumer is not confused by the marks on a product."[62] *Idaho Potato Commission* demonstrates how certification marks are viewed as a mandatory licensure with a goal of enabling consumers to enter a market and accurately select and value goods with an expected attribute. With respect to this goal,

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[51] Beresford, *supra* note 23 at 982.
[52] *See Id.* at 983–84.
[53] ID ST § 22-1202.
[54] *Id.*
[55] 335 F.3d 130 (2nd Cir. 2003).
[56] 425 F.3d 708 (9th Cir. 2005).
[57] 335 F.3d 130 (2nd Cir. 2003).
[58] *Idaho Potato Comm'n,* 335 F.3d at 132.
[59] *See Id.* at 133.
[60] *See Id.* at 139.
[61] *Id.* at 138.
[62] *Id.*

certification marks allow producers to transparently compete on an aspect of the good (in this case, the certified origin of potatoes as 100% in Idaho).

State of Idaho[63] focuses more on ensuring clarity between producers and consumers of a good. *State of Idaho* arose from an IPC enforcement action alleging that Defendant G & T failed to "keep adequate records" and used "unlicensed potato repackers."[64] Both actions were in violation of IPC's license agreement with G & T.[65] G & T responded (similarly to M & M[66]) that IPC's certification mark was "unenforceable and subject to cancellation under the Lanham Act."[67] Relying, in part, on the reasoning from *Idaho Potato Commission*, the court in *State of Idaho* affirmed a lower court's awarding of damages to IPC on the grounds that G & T's actions constituted counterfeiting.[68] In reaching this conclusion, the court emphasized the fact that the G & T's use of IPC's mark "implied that its potatoes [complied with] IPC's quality control procedures, and the fact that this was not the case was *likely to cause consumer confusion*."[69] *State of Idaho* is also useful as an example of judicial distinguishing between certification marks and trademarks. It highlights that one purpose of certification marks is similar to that of trademarks in preventing "public confusion."[70] *State of Idaho* highlights two structurally different goals of certification marks, echoing *Idaho Potato Commission*'s goal of producer competition[71] and a goal of ensuring that "the market will include as many participants as can produce conforming goods."[72]

Viewed together, these two cases illustrate the differences between trademarks and certification marks as well as the fact that certification marks' primary service is as a value indicator to the consumer. Interestingly, these cases also show the importance of mandatory licensing as a requirement for certification—both Defendants challenge the IPC's certification mark as invalid on the grounds that the IPC had "lost control" of it[73] and *State of Idaho* emphasizes mandatory licensing as a key structural difference between trademarks and certification marks.[74]

B. Differences in Certification

While most of the United States' certification marks are like "Made in Alaska," where the label must be applied to any "article that is made in the state,"[75] that position is not universal. There exists a small subset of certified goods where the geographic certified mark is paired with strict quality requirements. Two examples include Hatch chile from New Mexico and Smithfield ham from the Isle of Wight in Virginia. These certifications have stringent requirements above simple geography and therefore may not allow producers to communicate the product's value in a way that is accurately perceived by consumers. Further, for each of these goods it is possible that producers are placing a cultural value on the good itself which may not be adequately captured by market-based certification marks. At the same time, Hatch chile demonstrates the difficulty for agricultural products with both a geographic and a procedural element to achieve greater protection.[76]

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[63] 425 F.3d 708 (9th Cir. 2005).
[64] *Id.* at 712.
[65] *Id.*
[66] *See Idaho Potato Comm'n,* 335 F.3d at 133.
[67] *State of Idaho*, 425 F.3d at 712.
[68] *Id.* at 722.
[69] *Id.* (emphasis added).
[70] *Id.* at 716.
[71] *Id.* at 716–717 (quoting *Idaho Potato Comm'n,* 335 F.3d at 138).
[72] *State of Idaho*, 425 F.3d at 717 (reasoning structurally based on the mandatory licensing component of certification marks).
[73] *Compare Idaho Potato Comm'n,* 335 F.3d at 134 *with State of Idaho*, 425 F.3d at 712 (both arguing that the labeling of Idaho potatoes as such was unenforceable as it could be done by anyone).
[74] *State of Idaho*, 425 F.3d at 717.
[75] AS § 45.65.030 (c).
[76] *See* HATCH, Registration No. 3391024 (illustrating the eleven-year process to achieve greater protection).

i. Hatch Chile

Hatch chile is a rare example of an agricultural good with a quality component successfully achieving greater trademark protection. Hatch chile protects goods "grown in the Hatch valley of New Mexico."[77] New Mexico's peppers also have controls for cultivar, grading, harvesting, processing, cooking, display, heat, and color.[78] Hatch chile is a cultural touchstone in New Mexico. It is the subject of the state food, vegetable, smell, and question,[79] as well as the key decoration on license plates.[80] However, "Hatch" (or even the broader certification mark "New Mexico Chile"[81]), may not adequately communicate the quality or cultural value of the good. It isn't clear, outside a small subset of sophisticated chile consumers, that or even if most consumers attach any additional value to New Mexico chile over chile generally.[82]

Although Hatch chile is the rare product to have achieved property right protection, Hatch chile's trademark process is illustrative of the difficulty that a similar product may have in gaining greater protection. The original request was filed in 2007. The application was not approved until 2018.[83] Rather than the peppers themselves, which are appropriately protected purely under certification mark,[84] the trademark protects the "[e]nchilada sauce (and sauce for rice)" made under a specific process using Hatch peppers.[85] During the process from application to approval, at least one chile producer was found in violation of the certification mark by using the name "Hatch Chile" while sourcing chile not "even from the Hatch Valley" let alone meeting the mark's quality control measures.[86]

ii. Smithfield Ham

Smithfield ham provides the more common example of a good with a geographic and quality component in that it is protected exclusively by a certification mark.[87] Like Idaho Potatoes, where a related logo is trademarked for use on non-potato products,[88] Smithfield ham has a trademarked logo[89] but the ham itself is protected only by certification mark. The certification mark issued by the state of Virginia protects significantly more aspects of the ham than simply the location of origin. It defines "Genuine Smithfield hams" as

> hams processed, treated, smoked, aged, cured by the long-cure, dry salt method of cure and aged for a minimum period of six months; such six-month period to commence when the green pork cut is first introduced to dry salt, all such salting, processing, treating, smoking, curing, and aging to be done within the corporate limits of the town of Smithfield, Virginia.[90]

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[77] HATCH, Registration No. 3391024.
[78] N.M. Code R. § 21.16.7.9.
[79] NEW MEXICO SECRETARY OF STATE, ABOUT NEW MEXICO (2023).
[80] MOTOR VEHICLE DIVISION NEW MEXICO, LICENSE PLATES (2023).
[81] New Mexico Chile Labeling Act, N.M. Code R. § 21.16.7.7.
[82] Jay M. Lillywhite, Jennifer E. Simonsen, & Rhonda Skaggs, *Chile Consumers and Their Preferences Toward Region of Production-Certified Chile Peppers*, NMSU RSCH. REPORT 790, 9 (2015) (finding unclear linkage between New Mexico chile certification and awareness of product quality except among "chileheads").
[83] HATCH, Registration No. 3391024.
[84] HATCH, Serial No. 85942024 (currently under opposition).
[85] HATCH, Registration No. 3391024.
[86] El Encanto, Inc. v. Hatch Chile Co., Inc., 825 F.3d 1161, 1162 (10th Cir. 2016).
[87] *See also, e.g.*, WISCONSIN CHIEESE, Registration No. 3378315. Like Smithfield ham, Wisconsin has stringent quality, process, and labeling requirements for their cheese. *See* WI ADC § ADCP 81.22(1).
[88] CERTIFIED GROWN IN IDAHO 100% IDAHO POTATOES, Registration No. 3530137.
[89] AMBER BRAND, Registration No. 1032420.
[90] VA Code Ann. § 3.2-5419.

Virginia protects these hams under a criminal regime.[91] In Virginia, it is a Class 4 Misdemeanor to "knowingly label, stamp, pack, advertise, sell, or offer for sale any ham, either wrapped or unwrapped, in a container or loose, as a genuine Smithfield ham"[92] when that ham does not fit the definition in § 3.2-5419. Like Hatch chile, Smithfield ham holds cultural importance—the oldest ham is the subject of a 24-hour livestream.[93] Also like Hatch chile, it isn't clear whether consumers understand that the label "Smithfield ham" connotes anything other than place. In fact, many consumers seem to equate Smithfield ham with standard supermarket deli meat.[94]

C. The European PGI System

The European Union's regime for the protection of PGIs is different than that used in the United States. The United States' system focuses on efficient market operations.[95] In contrast, the European system protects *all* PGIs under a full intellectual property regime[96] "usually aimed at encouraging . . . innovation and individual creativity through the grant of a temporary monopoly."[97] The stated goal of the European regime is to ensure both "fair competition between the producers of products bearing [designations of geographical indication]" and "the credibility of the products" to the consumer.[98] The boundary conditions for goods to receive protected status under the European Regime is also significantly lighter than in the United States. *Nantucket* indicates that the test for PGIs requires that goods not only not be "obscure"[99] but also that they achieve the "goods/place association" through the public viewing the good as originating in a specific place.[100] Further, to achieve intellectual property right-type protection, a mark must overcome the additional hurdle of achieving secondary meaning in being tied to something other than the place irrespective of the good.[101] This is in sharp contrast to the European system where property protection attaches to goods "for which a link exists between product *or* foodstuff characteristics and geographical origin."[102] The European system is significantly lighter on two dimensions. One is that *all* protection requires is something that resembles *Nantucket's* "goods/place association." There is no obscurity test. Additionally, once that association is met, the PGI receives something more akin to full trademark protection than certification mark protection.

The *goals* of both the United States' and the European system are broadly the same. Both seek to ensure producers are adequately compensated for their goods and that consumers can accurately select and price goods in the market. At the same time, there is some degree of ongoing debate in the literature as to which regime is better fit to ensure both goals, either separately or together. Professor Beresford argues that the European system with its strict and easily obtained protections may have an unstated goal of maintaining a "rural landscape" and the tourism industry driven by the appeal of European agrarianism.[103] At a minimum, it is possible to see how the European system is at least in part protectionist. Professor Beresford documents how the European Commission has so far been resistant to pressure from the WTO to change their system to facilitate easier external market access.[104] Professor Beresford argues that one of the end results of the

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[91] VA Code Ann. § 3.2-5421.
[92] VA Code Ann. § 3.2-5420.
[93] *HAM CAM,* ISLE OF WIGHT COUNTY MUSEUM (2023), https://perma.cc/KV4A-TB48.
[94] *See* R.W. Apple Jr., *Americana, Salted, Smoked, and Sliced Thin*, N.Y. TIMES, Mar. 23, 2005 (describing the lack of consumer distinction between wet-brined hams sold by Smithfield Foods and Genuine Smithfield hams).
[95] Beresford, *supra* note 23 at 983.
[96] Council Reg. 510/2006, art. 7, 2006 O.J. (93/12) 12.
[97] Tomer Broude, *Taking "Trade and Culture" Seriously: Geograpical Indicators and Cultural Protection in WTO Law*, 26 U. PA. J. INT'L. L. 623, 631 (2005).
[98] Council Reg. 510/2006, pmbl., 2006 O.J. (93/12) 6.
[99] *Nantucket,* 28 U.S.P.Q.2d at *2.
[100] *Id.*
[101] E.H. Schopler, *Doctrine of secondary meaning in the law of trademarks and unfair competition*, 150 A.L.R. 1067 (II)(a) (1944).
[102] Council Reg. 510/2006, pmbl., 2006 O.J. (93/12) 8.
[103] Beresford, *supra* note 23 at 986.
[104] *Id.*

European system is that trade between countries is significantly restricted due to the burden on market access being on external players. The stricter protection afforded to European PGIs requires nations, rather than market players, to negotiate access.[105] She concludes that the American system is superior across the board as being more "cost-effective, efficient, . . . and fair."[106] Professor Tomer Broude represents a differing take, that a PGI regime may need to take seriously the cultural aspects of some PGIs and to do so may require a more intellectual property-like view.[107] Professor Broude broadly agrees with Professor Beresford that at least part of the European system is unfairly protectionist and cautions that cultural aspects can provide an easy defense for anti-competitive aims.[108] However, Professor Broude also argues that at least some PGIs (Parma ham being one example[109]) contribute to protecting both cultures of consumption and production.[110] For these PGIs, Professor Broude argues that the PGI is either allowing consumers to value a good because it is local, because there are objective quality factors, or because consumers place value on linking consumption with the place the good is produced.[111] His prescriptive conclusion is for a WTO system more akin to the American market-based PGI system though with some specific treatment for some goods with possible cultural value.[112]Angela Huisingh points to an additional risk to the lighter PGI protection afforded goods under the American system, that of "genericide."[113] Huisingh cautions that light PGI protection carries the risk of PGIs being diluted due to the "temptation to use them as descriptors."[114] Huisingh focuses on wine but reaches a similar conclusion to Professor Broude that while certification marks are generally optimal, they may not be enough for certain goods subject to inconsistent protection.[115]

III. Easing Trademark Protection for Certain American PGIs

A non-discerning consumer is one whose derived value from the label of a good is unequal to what the label literally communicates.[116] An example of this is a consumer who places extra value on the label "Bordeaux" but less value on Cabernet or Merlot, unaware that the region is inclusive of the grapes[117] making this distinction partially irrational. Making it simpler for a certification mark, upon meeting certain criteria, to receive trademark status could correct a market instability. The current difficulty for a certification mark to receive trademark status neither meets the goal of commercial marks nor does it promote market functionality. Part III.A demonstrates how the goal of certification marks is not being met for some goods if non-discerning customers are not accurately valuing highly specific PGIs in the United States. Part III.B considers Europe's property-based regime as being better fit for non-discerning consumers with respect to some specific goods.

A. The Non-Discerning American Consumer

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[105] *Id* at 989.
[106] *Id.* at 997.
[107] Broude, *supra* note 97 at 687.
[108] *Id.* at 691.
[109] *Id.* at 628.
[110] *Id.* at 656.
[111] *Id.*
[112] *Id.* at 688 (using as a basis the Universal Declaration on Cultural Diversity, U.N. Educational, Scientific, and Cultural Organization, UNESCO Doc. 31C/Res.25 (Nov. 2, 2001)).
[113] Huisingh, *supra* note 117 at 223.
[114] *Id.* (citing "champagne" as an example of a PGI that the EU has expressed concern about the use of as a descriptor rather than as a pure PGI).
[115] *Id.* at 224.
[116] *See, e.g.,* Catherine Mariojouls & Cathy Roheim Wessells, *Thalassorama: Certification and Quality Signals in the Aquaculture Sector in France,* 17 Marine Res. Econ. 175, 179 (2002) (demonstrating that adding quality labeling in French aquaculture markets causes consumer confusion rather than market stability).
[117] Angela Huisingh, *I Like Cabernet and Merlot but I'm not Drinking Bordeaux: Certified Confusion,* 13 J. Marshall Rev. Intell. Prop. L. 203, 204 (2013).

Those PGIs in the United States that refer to geography and to quality are likely particularly susceptible to market distortion from non-discerning consumers. The label may therefore not be adequate to communicate the producer's value of the good to the consumer. *Idaho Potato Commission* states a goal of "[facilitating] consumer expectations of a standardized product, much like trademarks are designed to ensure that a consumer is not confused by the marks on a product."[118]

Non-discerning consumers' perceptions of highly quality-controlled PGIs may not capture the reality of the product. For goods like Hatch chile or Smithfield Ham, where the geographic label is inclusive of a strict quality control regime, it is possible that the public is making a generic "goods/place association"[119] in tying the good only to its point of origin such as Hatch, New Mexico or Smithfield, Virginia. At the same time, some evidence indicates that these goods may be niche enough that, absent rare, sophisticated consumers, the public is not making any association *other* than generic location. That association does not fully capture what the label means to the producer.[120] This incomplete association presents an issue in that the label is protecting something beyond simple pricing but simultaneously is for too specific a good to acquire a wide secondary meaning. Unlike *Nantucket*, where the Trademark Trial and Appeal Board found that "Nantucket" referred to place of origin both to producers and to consumers,[121] the subset of United States PGIs that protect location as well as quality do not adequately confer information from producers to consumers. Nathaniel F. Rubin describes how this misses the dual goal of trademarks as protection for both producers and for consumers. He illustrates wide variety in how certification marks are applied, with some states applying them to any good made in state and others applying marks only to specifically sourced, manufactured, and marketed goods.[122]

Not only is there a wide variety in state application of certification marks, but some certification marks are used to capture difficult-to-quantify aspects of a good. Some states, like both New Mexico and Virginia, use certification marks either to indicate the cultural value of a good or to increase the good's local value by tying it to local identity.[123] The variety in application may make it difficult for certifiers and producers to communicate the value of a product. The end result is consumer confusion—consumers cannot adequately value a good in the market.[124] A further downside is that these niche goods may never acquire a secondary meaning (that is, they fail *Nantucket's* "obscurity test"[125]). Therefore, stronger protection is rarely available, and even if it were, it can be difficult to effectively prove that the requirements for stronger protection are met.[126]

B. Europe's Property-Based System as Better for Non-Discerning Consumers

Considering both Professor Beresford's and Broude's views, the American market solution of certification marks seems better for most PGIs. However, for those PGIs that are more impacted by non-discerning consumers, something like the European property-based system seems like a better fit. The PGIs

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[118] Idaho Potato Comm'n v. M & M Produce Farm & Sales, 335 F.3d 130, 138 (2nd Cir. 2003).
[119] *See* In re Nantucket Allserve, Inc., 28 U.S.P.Q.2d 1144 at *2 (T.T.A.B. 1993).
[120] The consumer research data on this subset of goods is unclear. Each is a search good with high search costs. For an example of unclear consumer preference, *see, e.g.*, *Consumer appreciation for Wisconsin Cheese has grown significantly*, DAIRY FOODS, Feb. 8, 2023 (showing high consumer willingness to pay for cheese labeled "Wisconsin" regardless of quality, in contrast to the WI statute tiering its own cheese by location and by quality).
[121] *See Nantucket*, 28 U.S.P.Q.2d at *3.
[122] Rubin, *supra* note 22 at 1031 (illustrating how some states use certification marks for any good made in state while other have strict requirements for how goods are made).
[123] *See generally* Kimberly Weisul, *Consumers Buy Into 'Buy Local'*, BLOOMBERG BUSINESSWEEK, Feb. 18, 2010 (tracking an increase in both advertising focusing on the localness of goods and consumer spending on goods originating in their local area); Brian Wallheimer, *Why Craft Beer's Rise is a Warning for All Sorts of Big Brands*, CHI. BOOTH. REV., June 28, 2021 (demonstrating, in part, that tying craft beer advertising to local production increases consumer demand).
[124] *See* Rubin, *supra* note 22 at 1056 (describing simultaneous over- and under- inclusivity problems in current certification mark policy).
[125] *See Nantucket*, 28 U.S.P.Q.2d at *2 (requiring that a location, to be protected, not be "obscure" to the U.S. public).
[126] J. THOMAS MCCARTHY, 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 20:19 (5th ed. 2023) (describing the legal difficulty of arguing for secondary meaning).

most susceptible to non-discerning consumers are those like Hatch chile or Smithfield ham where the mark protects not just geography but also quality or process. For those goods, their marks do not allow producers and consumers to transact to the goods' full values. As a parallel issue, these goods are such that their relative niche may make it difficult for them to pass the secondary meaning requirement. One way to achieve this would be to allow easier trademark access for goods with a process component by removing the "secondary meaning" requirement. The current issue is one where the market is not adequately able to capture the needs of either producers or consumers for a select and small class of American PGIs. Easing trademark requirements for PGIs with associated quality requirements would simply be bringing these PGIs in line with market expectation.

Most American PGIs are similar to Idaho potatoes in that the mandatory licensing scheme inherent in certification mark protection[127] *is sufficient* to meet the goal of ensuring that markets are open to multiple producers so long as those producers can demonstrate that they comply with statutory requirement.[128] This seems intuitive for many agricultural goods that consumers attach local, cultural, or other value to, and, being agricultural, are grown on a larger scale. For these simple transactions, certification marks seem to meet the goal of consumers being able to trust that the good was produced in a certain place (100% in Idaho, for instance) and producers will be rewarded appropriately for their efforts. The goal for geographic-only PGIs is to facilitate market entry and certification marks seem the optimal device for that goal.

There are two structural issues that prevent mandatory licensing from accurately communicating the value of PGIs with requirements above simple geography.[129] One is the problem of non-discerning consumers. Non-discerning consumers may not be aware that those PGIs are not fully descriptive of the nature of what they protect. Smithfield ham is illustrative of this problem. "Genuine Smithfield ham" protects many more product attributes of hams than simply the fact they originate in Smithfield, and that doesn't seem to be a widely known fact.[130] Given that, non-discerning consumers may not be able to adequately value their product and producers may not be adequately compensated. Greater protection would allow producers and licensors better control and protection for the methods and quality they use, and consumers more adequate value attached to the methods, quality, and perhaps cultural aspects. Goods like Smithfield ham are more similar to goods driving the European Union's concern with preserving cultural and production value, such as Parma ham or Champagne, than are they to Idaho's potatoes. A more property rights-based system, as a trademark would protect, therefore better fits these goods. The bundle of attributes that attach value to these goods are inclusive of more than just geography but also of aspects more akin to intellectual property such as method, technique, or control. The other issue is the difficulty in attaining greater protection for quality tied PGIs under the current regime. Given the descriptive nature of PGIs, secondary meaning is difficult to achieve for PGIs that protect more than just geography. Huisingh's concern with "genericide"[131] is one related consequence which could lead to quality tied PGIs not protecting value. Hatch chile is illustrative of another issue, where during the lengthy battle for greater protection, companies were specifically able to abuse the quality associated with the descriptor to confuse consumers into paying higher value for an inferior product. Easier access to greater protection for the processes in Hatch chile could prevent consumer confusion and misuse of a descriptive label.

CONCLUSION

[127] *State of Idaho Potato Commission v. G & T Terminal Packaging, Inc,* 425 F.3d 708, 717 (9th Cir. 2005).
[128] *Id.*
[129] A third issue, which this paper does not reach, is the one of discriminatory application. Intellectual property-type protection may allow greater discretion in *not* licensing a good—Colorado, for instance, has run into recent challenges in how to license in-state marijuana products. A non-mandatory scheme could allow greater latitude in how those goods are marked. *See* Rubin, *supra* note 22 at 1026–27 (describing Colorado's difficulty in how to mark marijuana derived products with a "byColorado" label in light of rapidly changing political acceptance of marijuana use and legality).
[130] *See generally* R.W. Apple Jr., *Americana, Salted, Smoked, and Sliced Thin*, N.Y. TIMES, Mar. 23, 2005.
[131] Huisingh, *supra* note 117 at 223.

Anecdotally, it is not hard to argue that consumers want to buy local. The data support that conclusion as well.[132] There are many reasons for this, from locavore impulses to cultural values to a perception of quality. Regardless of reason, consumers want local goods and are willing to place value in them. This paper focuses on chile in part because I, like many New Mexicans, consider that product to be a key part of state and cultural heritage[133] and am willing to pay a premium for those aspects. While chile may be New Mexico's specific local pride, it is extremely common for a place to have a cultural food.[134] It is easy to think of some agricultural good that a person's place of origin takes extremely seriously. That person may want that good to be local and high quality. For many such goods, PGIs provide a solution—a consumer can see a label and know immediately that the good is one they can trust. Unfortunately, for a number of goods where quality and process are as tied as origin, PGIs are not adequate. As the United States, and the world, becomes increasingly mobile, it is likely that consumers will have to rely more on labeling to have goods from their place of origin. This paper has attempted to argue that allowing trademark protection for quality tied PGIs while maintaining certification marks for geographic-only PGIs will correct a market instability. The change argued for will allow producers and consumers of some PGIs to trust the label and adequately value the good while also not constraining the market from entry.

[132] Bart Bronnenberg, Jean-Pierre Dubé, & Joonwhi Joo, *Millennials and the Takeoff of Craft Beer Brands: Preference Formation in the U.S. Beer Industry*, 41 MARKETING SCI. 663, 677 (2022) (finding a strong positive coefficient for "local" in beer consumption).
[133] NEW MEXICO TOURISM DEPARTMENT, NEW MEXICO: CHILE CAPITAL OF THE WORLD (2023).
[134] Emma Taubenfeld, *The Official State Food of All 50 States*, READERS DIGEST, May 5, 2023.

Applicant Details

First Name	**Raymond**
Last Name	**Simmons**
Citizenship Status	**U. S. Citizen**
Email Address	**rsimmons@jd21.law.harvard.edu**
Address	**Address** Street **805 Channing Pl NE, Apt. A317** City **Washington** State/Territory **District of Columbia** Zip **20018** Country **United States**
Contact Phone Number	**3134451744**

Applicant Education

BA/BS From	**George Washington University**
Date of BA/BS	**May 2016**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 27, 2021**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**District of Columbia**

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Desan, Christine
desan@law.harvard.edu
617-495-4613
Mann, Bruce
mann@law.harvard.edu
617-495-3193
Rossi, Patricio
prossi@law.harvard.edu
617-496-4143

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Raymond B. Simmons

805 Channing Pl. NE, Apt. A317 Washington, DC 20018 • rsimmons@jd21.law.harvard.edu • 313.445.1744

June 23, 2023

The Honorable Stephanie Dawkins Davis
Judge for the United States Court of Appeals for the Sixth Circuit
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Room 1023
Detroit, MI 48226

Dear Judge Davis:

This letter is to express my interest in a position as a judicial law clerk in your chambers for the 2024 term. Since graduating from Harvard Law in 2021, I have been working as a litigation associate for Jenner & Block, LLP's Washington, D.C. office. During this time, I have worked on both criminal and civil appellate matters, complex commercial litigation, and public policy litigation.

In law school, I served on the *Harvard Law and Policy Review* and spent two years as a student attorney for the Harvard Legal Aid Bureau (HLAB). As a student attorney, I was proud to represent and secure favorable outcomes for dozens of indigent clients who were victims of wage theft and other collateral issues for the Wage & Hour practice group.

Between taking the bar and starting as an attorney at Jenner, I worked as a Pro Bono Fellow at the Public Defender Service for the District of Columbia (PDS) in their Appellate Division. While at PDS, I helped draft appellate briefs to be filed in the D.C. Court of Appeals, notably an amicus brief addressing issues regarding the District of Columbia's Second Look Act.

Enclosed, please find my resume, transcript, and required writing samples for your review. Your chambers should also receive the appropriate letters of recommendation on my behalf directly from the recommenders.

As a native Detroiter who moved away to learn about the law and its place in our society, it would be an honor and full-circle experience to move back home to work under your mentorship. I believe my academic and professional training, as well as my passion and dedication to this profession, have provided me the tools to contribute to the important work of your chambers. I welcome any opportunity to interview with you. Thank you for your consideration.

Sincerely,

Raymond B. Simmons

Raymond B. Simmons

805 Channing Pl. NE, Apt. A317 Washington, DC 20018 • rsimmons@jd21.law.harvard.edu • 313.445.1744

EDUCATION

Harvard Law School — **Cambridge, MA**
Juris Doctor — August 2018 – May 2021
Editor, *Harvard Law and Policy Review*
Student Attorney and Treasurer, Harvard Legal Aid Bureau
Committee Member, Black Law Students Association

George Washington University — **Washington, DC**
Bachelor of Art, Public Policy / Minor, Law and Society — January 2013 – May 2016
Honors/Awards: *cum laude*, National Political Science Honors Society, National Society of Collegiate Scholars

PROFESSIONAL EXPERIENCE

Jenner & Block, LLP — **Washington, DC**
Associate — November 2021 – present
Summer Associate — June 2020 – July 2020
SEO Law Fellow — May 2018 – July 2018
- Engaged in rigorous motions practice regarding government controversy, public policy, and complex commercial litigation disputes.
- Conducted research, composed legal memoranda, and assisted in conducting client interviews related to internal and external government investigations.
- Researched and drafted a United States Supreme Court amicus brief.

Public Defender Service for the District of Columbia — **Washington, DC**
Pro Bono Fellow — September 2021 – November 2021
- Drafted an Amicus Brief to be filed in the D.C. Court of Appeals on issues related to the District of Columbia's Second Look Act.
- Participated in oral argument hearing preparations for various criminal and civil law matters.

Paul Hastings, LLP — **Washington, DC**
Summer Associate — July 2020 – August 2020
- Conducted research and composed legal memoranda related to litigation matters involving breach of contract disputes and Second Amendment challenges to federal statutes.
- Researched law related to FCPA investigations and independent monitorships for legal scholarship.

Buckley LLP — **Washington, DC**
Summer Associate/LCLD Fellow — May 2019 – August 2019
Paralegal — August 2016 – May 2018
- Composed legal memoranda related to litigation matters involving financial service transactions and procedures.
- Drafted Motions to Dismiss for high-ranking executives in white collar litigations; reviewed, drafted, and cite-checked legal briefs, motions, and other docket materials/publications.
- Assisted General Counsel with analyzing, reviewing, and tracking client-provided Outside Counsel Guidelines.

Quicken Loans, Inc. — **Washington, DC**
Government Relations Associate — May 2015 – August 2016
- Researched and reported trending banking and finance legislation initiatives to the Government Relations Team.
- Drafted talking points and general outlines for various Government Relations Team public appearances.
- Advocated on behalf of both the Quicken Loans and the City of Detroit related to legislative initiatives.

PUBLICATIONS

- Jan Larson & Raymond Simmons, Favoring Coverage for Business Email Compromise Losses (Law 360 2018).
- Raymond Simmons, Prosecutorial Discretion in U.S. Criminal Law (The Ohio State University Undergraduate Law Review: Volume 2, Issue 1 (2015)).

Harvard Law School

Date of Issue: November 29, 2021
Not valid unless signed and sealed
Page 1 / 2

Record of: Raymond B Simmons Jr.
Current Program Status: Graduated
Degree Received: Juris Doctor May 27, 2021
Pro Bono Requirement Complete

JD Program

Fall 2018 Term: August 29 - December 20

1000	Civil Procedure 5 Fitzpatrick, Brian	P	4
1001	Contracts 5 Rakoff, Todd	P	4
1006	First Year Legal Research and Writing 5A Krishnamurthi, Guha	P	2
1004	Property 5 Mann, Bruce	P	4
1005	Torts 5 Goldberg, John	P	4

Fall 2018 Total Credits: 18

Winter 2019 Term: January 07 - January 25

1051	Negotiation Workshop Moffitt, Michael	CR	3

Winter 2019 Total Credits: 3

Spring 2019 Term: January 28 - May 17

1002	Criminal Law 5 Kamali, Elizabeth Papp	P	4
2176	Financial and Legal Needs of Low and Moderate Income Households Charn, Jeanne	P	2
1006	First Year Legal Research and Writing 5A Krishnamurthi, Guha	P	2
1018	Law and International Development Pistor, Katharina	P	4
1003	Legislation and Regulation 5 Rodriguez, Daniel	P	4

Spring 2019 Total Credits: 16
Total 2018-2019 Credits: 37

Fall 2019 Term: August 27 - December 18

2079	Evidence Medwed, Daniel	P	3
2134	Introduction to Advocacy: Skills and Ethics in Clinical Practice Caramello, Esme	P	2
2219	Regulation of Financial Institutions Tarullo, Daniel	P	3

Fall 2019 Total Credits: 8

Fall 2019 - Spring 2020 Term: August 27 - May 15

8000	Harvard Legal Aid Bureau 2L Caramello, Esme	CR	8

Fall 2019 - Spring 2020 Total Credits: 8

Winter 2020 Term: January 06 - January 24

2249	Trial Advocacy Workshop Sullivan, Ronald	CR	3

Winter 2020 Total Credits: 3

Spring 2020 Term: January 27 - May 15

Due to the serious and unanticipated disruptions associated with the outbreak of the COVID19 health crisis, all spring 2020 HLS academic offerings were graded on a mandatory CR/F (Credit/Fail) basis.

2000	Administrative Law Vermeule, Adrian	CR	4
2134	Introduction to Advocacy: Skills and Ethics in Clinical Practice Caramello, Esme	CR	1
2234	Taxation Kaplow, Louis	CR	4

Spring 2020 Total Credits: 9
Total 2019-2020 Credits: 28

Fall 2020 Term: September 01 - December 31

2052	Critical Theory in Legal Scholarship Halley, Janet	P	2
2537	Introduction to Finance Concepts 4-Day Section Dharan, Bala	CR	1
2178	Legal Writing: Advanced Burling, Philip	CR	2
2218	Real Estate Kelly, Daniel	CR	1

Fall 2020 Total Credits: 6

Fall-Spring 2020 Term: September 01 - May 14

2001	Advanced Clinical Practice Whiting, Patricia	CR	2
8010	Harvard Legal Aid Bureau 3L Caramello, Esme	CR	8

continued on next page

Assistant Dean and Registrar

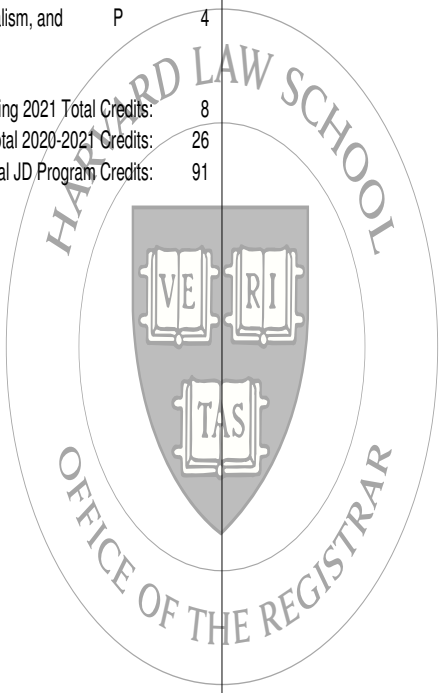
Harvard Law School

Record of: Raymond B Simmons Jr.

Date of Issue: November 29, 2021
Not valid unless signed and sealed

3028	Money Design and Inequality Desan, Christine	H	2
	Fall-Spring 2020 Total Credits:		12
	Spring 2021 Term: January 25 - May 14		
2035	Constitutional Law: First Amendment Fried, Charles	P	4
2036	Constitutional Law: Separation of Powers, Federalism, and Fourteenth Amendment Klarman, Michael	P	4
	Spring 2021 Total Credits:		8
	Total 2020-2021 Credits:		26
	Total JD Program Credits:		91

End of official record



Assistant Dean and Registrar

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

~~~~~~

A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program

Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)

Magna cum laude	Next 10% of the total class following *summa* recipients
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates

LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Assistant Dean and Registrar

June 24, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Letter of Recommendation for: Ray Simmons

Dear Judge Davis:

I am delighted to recommend an excellent candidate, Ray Simmons, to you as a law clerk. I taught Ray last year in a research seminar, Money Design and Inequality. The seminar was an intensive one, in which we covered a challenging set of readings. Students then undertook independent research for a significant paper, as well as serving as commentators on each others' work. I therefore came to know Ray well.

Ray was an extremely impressive student with great analytic capacity. He began the course at something of a disadvantage: most students had taken other classes on the monetary system at HLS, a prerequisite for the class. I admitted Ray instead on the basis of his work for the financial industry before law school. That turned out to be a wise decision; Ray quickly made sense of the monetary architecture at issue in the class. He turned in a series of very sharp analyses of the sources we encountered. This is an individual with a terrific intellect.

Ray finished the semester with a superb paper about the financial consequences of incarceration. The study, "Locked up Economics: The Chilling Wealth Extraction of the Carceral State from Marginalized Household and a Possible Solution Hiding in Plain Sight," was an eye-opening review of the extractive effects of incarceration, as well as an exceptionally powerful piece of advocacy. The paper analyzed the financial practices that obtain in our jails and prisons as "an internal monetary system," with attention to the cycle of poverty that correlates with incarceration, the state fees and debt that increase the likelihood of that event, and the expenses that attend jailtime for individuals and families. Ray zeroed in on the exclusion of imprisoned people from traditional banking services, arguing that opening access to them would significantly reduce the extractive impact of incarceration. The argument was very well done, and I have encouraged Ray to develop the paper for publication.

Ray balanced the class with a consuming set of clinical duties at Harvard Law School. His commitment to the Harvard Legal Aid Bureau was tremendously demanding. It meant continual conflicts between his clients and his classroom duties. Ray managed to meet all his responsibilities and to do so with great success. He has demonstrated a maturity and judgment that is more than many of his peers could muster.

Ray would make a superb law clerk. In turn, he will put the skills and experience you give him to good use: he aims to hone his skills as a litigator, and then to apply his talents as lawyer to the need of disenfranchised communities. He offers fabulous potential towards that end. I recommend him with great enthusiasm.

Sincerely,

Christine Desan
Leo Gottlieb Professor of Law

Christine Desan - desan@law.harvard.edu - 617-495-4613

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing to recommend Raymond B. Simmons to your consideration for a clerkship. Mr. Simmons was a student in my first-year course in Property at HLS in the fall semester of 2018. I run an aggressively Socratic Property class in which I call on each student many times during the semester (at the rate of forty to fifty students per class), so I had ample opportunity to observe his performance in a large substantive class. In addition, we had several conversations outside class and during office hours.

Mr. Simmons's resilience, persistence, and capacity for hard work stood him well in class. Whenever he would stumble during an exchange–as everyone did at one time or another–he would right himself and throw himself back into the fray without hesitation. His clear sense of why he was in law school in the first place helped carry him through the initial shock of being called on. I watched him climb the learning curve, getting better and better in class, learning how to move the analytical ball forward. He is not flashy, but he is very thoughtful and has real substance. His eagerness to learn were palpable. Both in our exchanges in class and in questions after class, he always pushed to make deeper connections and try out new ideas. Even as his analytical abilities improved, he never lost sight of the people behind the cases–a quality that I suspect was part of what drew him to devote two years to the Harvard Legal Aid Bureau and to enjoy such success as a student attorney there. His final exam showed him to be adept at puzzling through unfamiliar fact patterns, sorting through what matters and what does not, reasoning his way to an appropriate conclusion, and making his arguments effectively. He writes clearly and persuasively.

Mr. Simmons will make a fine clerk. He has demonstrated his legal research and writing abilities across a wide range of activities and internships. In everything he does, he has demonstrated himself to be thoughtful, hard-working, detail oriented, and professional. He is fair-minded and always considers both sides of an argument. He is also eager to learn and will bring to each task the curiosity of a committed student. For all this, he is actually rather mild-mannered and will be a pleasure to work with.

In sum, I recommend him highly. Please do not hesitate to contact me if you have any questions.

Very truly yours,

Bruce H. Mann

Bruce Mann - mann@law.harvard.edu - 617-495-3193

July 03, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am delighted to write in support of Raymond Simmons' ("Ray") application for a Law Clerk position with your court. Ray was a thoughtful and hard-working student with excellent research and writing skills. I am confident he will be an outstanding Law Clerk.

In the fall of 2019, at the beginning of his second year of law school, Ray joined the Harvard Legal Aid Bureau ("HLAB"), Harvard Law School's largest civil legal aid clinic. In joining, Ray made a two-year commitment to zealously advocate for HLAB's marginalized clients. As a Senior Clinical Instructor, I was Ray's direct supervisor on the majority of his clinical work.

Ray spent at least twenty hours per week working on behalf of the clinic's indigent clients. He took a disciplined and thoughtful approach to each of his cases, understanding the relevant law, spotting and analyzing the key issues, and devising appropriate and often creative strategies for obtaining optimal results for his clients. Ray's success was largely attributable to his hard work. He is an extremely dedicated and tireless advocate on behalf of his clients.

During his time at HLAB, Ray represented multiple clients in our wage theft practice. Ray's work was exemplary in all aspects of client representation: client interviewing and counseling, drafting demand letters and complaints, negotiating with opposing parties and counsel, and arguing in court (in person or via Zoom). Ray's success in these areas was due in large part to two qualities – his work ethic and his ability to familiarize himself with a new area of law.

Ray is a very diligent and conscientious worker. All of his assignments were completed in a timely manner and he communicated in advance if he ran into any difficulties. He did not shy away from taking on extra responsibility, as evidenced by his decision to serve on HLAB's student Board of Directors as HLAB's Treasurer. In addition to being the lead advocate on a number of cases, Ray worked closely with HLAB's administrative staff in coordinating HLAB's finances.

While HLAB provides training on the substantive areas of law that the students will practice in, it is done in a condensed period right when the students first join. As Ray exemplifies, familiarity with the law comes best from the student's independent research skills. Ray learned the intricacies of Massachusetts and Federal wage law such that he successfully resolved most of his cases. He drafted persuasive demand letters and compelling complaints. His outstanding work on a dispositive motion led to the success of the Court granting our affirmative Motion for Judgment on the Pleadings. His knowledge of the law enabled him to obtain favorable outcomes through negotiations and in court.

Ray is a superb applicant for a Law Clerk position. I recommend him without any qualification or reservation whatsoever and hope that you will not hesitate to contact me if there is any additional information that I can provide.

Sincerely,

Patricio S. Rossi
Lecturer on Law and Senior Clinical Instructor

Patricio Rossi - prossi@law.harvard.edu - 617-496-4143

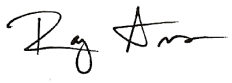
Raymond B. Simmons

805 Channing Pl. NE, Apt. A317 Washington, DC 20018 • rsimmons@jd21.law.harvard.edu • 313.445.1744

WRITING SAMPLE

Below, please find a Rule 12(c) motion for partial judgment on the pleadings that I am submitting as a writing sample. The motion was filed as part of my representation of an indigent client of the Harvard Legal Aid Bureau. Usually, the Bureau represents current or former employees who are seeking wages that have been unlawfully withheld by their employers. In this instant, my client was a former employee for a demolition company and was not paid wages owed throughout his employment. We filed suit in state court. Upon receiving the defendant's answer, we believed that there was no dispute of any material fact establishing a violation of the Wage Act. So, we filed for partial judgment on the pleadings as to the defendant's liability.

Sincerely,



Raymond B. Simmons

HARVARD LEGAL AID BUREAU
23 EVERETT STREET, FIRST FLOOR
CAMBRIDGE, MASSACHUSETTS 02138-2702

(617) 495-4408 (617) 496-2687 (FAX)

February 1, 2021

Via e-File
Clerk of Courts
District Court
Somerville Division

Re: Arnol Herrera v. TNT Construction, Inc. and Antonio Pires
Docket No. 2010-CV-0237

To Whom It May Concern:

Enclosed for filing in the above referenced matter, please find Plaintiffs' Motion for Partial Judgment on the Pleadings. **Please schedule this matter to be heard during the remote hearing already scheduled for Wednesday February 10, 2021 at 9:00 am.**

Please contact me with any questions or concerns.

Thank you for your attention to this matter.

Sincerely,

/s/ Raymond Simmons
Raymond B. Simmons
S.J.C. Rule 3:03 Counsel
Rsimmons.jd21@hlsclinics.org
617-495-4408

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.	**DISTRICT COURT DEPARTMENT SOMERVILLE DIVISION**
ARNOL HERRERA Plaintiff, v. TNT CONSTRUCTION, INC. and ANTONIO J. PIRES Defendants.	Docket No. 2010-CV-0237

PLAINTIFF'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

COMES NOW Plaintiff Arnol Herrera, by and through counsel of record, and hereby moves for Partial Judgment on the Pleadings. Due to TNT Construction Inc.'s and Antonio J. Pires' (collectively, "Defendants"), failure to allege sufficient facts in their Answer, Plaintiff asks this Court to award the relief requested in Count Three of the Complaint pursuant to Mass. R. Civ. P. 12(c).

I. Introduction

This case arises out of Defendants' failure to pay Plaintiff timely wages and overtime wages. Defendants provide demolition and construction services, and employed Plaintiff to perform various demolition and construction related tasks. Defendants employed Plaintiff from September 15, 2019 until January 27, 2020. Defendants agreed to pay Plaintiff $150 per day or $18.75 per hour.

Throughout Plaintiff's employment, on numerous occasions, Defendants failed to pay Plaintiff for work performed. After unsuccessfully attempting to collect the unpaid wages, Plaintiff brought suit in this Court under the Massachusetts Wage Act, Federal Labor Standards Act, and common law. In Count Three of his Complaint, Plaintiff requests $33,412.65 ($11,137.55 trebled) in damages for unpaid wages. In their Answer, Defendants concede liability and admit to owing

Plaintiff money. Because Defendants have already conceded liability, Plaintiff is entitled to judgment on the pleadings as a matter of law.

II. Statement of Facts

Defendants provide demolition and construction services to both residential and commercial clients in the Greater Boston region. Defendants hired Plaintiff in September 2019. Compl. ¶ 7. Plaintiff was hired to assist with demolishing and constructing buildings, as well as other tasks around the construction site. *Id.* ¶ 8. Plaintiff agreed to be paid $150 per day, or $18.75 per hour. *Id.* ¶ 10.

After November 2019 and through January 2020, Defendants withheld payments and failed to pay Plaintiff the required overtime premium when Plaintiff worked more than 40 hours a week. *Id.* ¶ 23-24. Defendants made a myriad of excuses for their failure to pay, and promised to pay on several occasions. *Id.* ¶ 19. However, ultimately, Defendants never actually paid Plaintiff the wages owed. *Id.* ¶ 24.

III. Standard of Review

Under Mass. R. Civ. P. 12(c), judgment on the pleadings is available to "any party" as a means of vindicating claims or defenses that enjoy undisputed factual support. *Clarke v. Metropolitan District Comm'n*, 11 Mass. App. Ct. 955, 955 (1981) (finding judgment on the pleadings appropriate "where there are no material facts in dispute on the face of the pleadings"). The Court's review of 12(c) motions are limited to the content of the parties' pleadings and any documents attached thereto. *See* Mass. R. Civ. P. 12(c). Thus, only the Complaint, Answer, and supporting materials attached thereto provide the factual material for the purposes of this motion.

IV. Argument

a. ***Defendants have not alleged facts sufficient to deny liability***

Defendants' Answer to the Complaint makes one thing patently clear, Defendants owe Plaintiff money. Answer ¶ 13-18. Indeed, Defendants' factual allegations are materially the same as the facts advanced in the Complaint. The Answer readily admits that Plaintiff was an employee of Defendants, performed work for Defendants, and that Defendants failed to pay Plaintiff for work performed. *Id.*

Defendants offer a number of excuses for their malfeasance and generally dispute the amount owed. *See generally* Answer. However, even if all the facts alleged in the Answer are true,

no reading of the Answer frees Defendants of liability. Making excuses for a violation of the law is not sufficient to alleviate the Wage Act's strict liability, and arguing the amount owed is not the same as arguing the violation of law. State and federal wage laws could not be clearer: an employer who fails to pay their employee for work performed is liable for damages. Accordingly, Plaintiff is entitled to judgment on the pleadings as a matter of law.

i. *Count Three: Failure to Pay Timely Wages (G.L. 149,* §148)

Defendants readily concede that they previously failed to pay Plaintiff, and that they still owe Plaintiff money. Answer ¶ 13-18. On those occasions that Defendants failed to pay Plaintiff anything, Defendants violated both the Massachusetts Minimum Wage statute and the Massachusetts Wage Act for timely payment of wages. To state a claim under the Wage Act, Plaintiff need only show that he was not properly compensated. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). Both the Complaint and Answer make it clear that Plaintiff performed work for Defendants and was not properly compensated. When the presence of damages is certain and only the amount is questioned, courts may still award damages to employees even though the result is only approximate. *Id.* at 688. This Court should award such damages.

Even if the Court chooses to not award the specific relief requested in the Complaint, the Court still has the power to enter judgment in favor of Plaintiff regarding the violation of law. The Court can, then, allow the parties to engage in a fact-finding process related only to the question of the amount of damages owed.

b. ***None of Defendants' Affirmative Defenses Shield them from Liability***

Defendants assert seven affirmative defenses, none of which relieve them of their liability to Plaintiff. Two (2) affirmative defenses are regarding the stated claim and service. Three (3) defenses are regarding third-party breaches of contract and the COVID-19 emergency. The last two (2) defenses are regarding Defendants' dispute as to the amount in damages owed. Plaintiff responds to each defense raised, respectively.

i. Affirmative Defenses 1 and 7: Plaintiff has properly stated a claim and served Defendants

Defendants assert, without any factual allegations to support their assertion, that Plaintiff has failed to state a claim for which relief can be granted and that there was improper service. Answer at 4-5. On the contrary, Plaintiff has established a prima facia case for federal and state wage violations. Defendants employed Plaintiff for months without paying him. Both the

Complaint and the Answer agree on these facts. The relief for wage violations is treble damages of the original wage owed. Plaintiff has filed suit in a court of appropriate jurisdiction, Defendants have received notice of the suit, answered the Complaint, and have been in contact with both Plaintiff's counsel and this Court. Thus, any assertion that Plaintiff has failed to properly state a claim or that Defendants have not been properly served is unfounded.

ii. *Affirmative Defenses 3, 4, and 5: The COVID-19 emergency shutdown and third-party breaches do not excuse Defendants from strict liability under the Wage Act.*

Defendants assert three affirmative defenses, *force majeure*, impossibility of performance, and frustration of purpose. The affirmative defenses are raised ostensibly due to COVID-19 complications and third-party contractual breaches. Answer ¶ 24. However, none of these defenses excuse Defendants for their failure to pay wages. *Force majeure*, or "act of God", clauses refer to expressed contractual terms, not common law principles. *See e.g. Baetjer v. New England Alcohol Co.*, 319 Mass. 592, 598 (1946); *see also Itek Corp. v. First Nat. Bank of Boston*, 730 F.2d 19, 21 (1st Cir. 1984). No written contract existed here, and, thus, no *force majeure* clause can be implied.

Generally, both frustration of purpose and impossibility of performance are defenses raised in contractual disputes. *See Chase Precast Corp. v. John J. Paonessa Co.*, 409 Mass. 371 (1991). Wage Act violations impose a strict liability on employers. *Dixon v. Malden*, 464 Mass. 446, 452 (2013). Thus, neither of these defenses excuse Defendants' malfeasance. Herein, Plaintiff responds to both defenses of impossibility and frustration as they relate to COVID-19 shutdown orders and Defendants' third-party contractual breach.

***COVID*-19**: Defendants raise both impossibility and frustration of purpose as defenses to argue that Defendants were unable to pay Plaintiff due to COVID-19 related shutdowns. However, the timeline does not permit for such defenses. Both impossibility of performance and frustration of purpose require supervening event, either significantly frustrating performance or making performance impossible. *Chase Precast Corp. v. John J. Paonessa Co.*, 409 Mass. 371 (1991). Regarding this case, COVID-19 related government closures simply cannot be a supervening event for the failure to pay timely wages.

Defendants' violations of wage laws were committed well before the pandemic closed the Massachusetts economy. Defendants made their last payment to Plaintiff on or about November 25, 2019. Complaint ¶ 13; Answer ¶ 13. As Plaintiff continued working for Defendants,

Defendants were obligated to pay Plaintiff within 6 or 7 days after the conclusion of the next pay period. G.L. c. 149, § 148. At the absolute latest, this means Defendants began violating the Wage Act in mid-December 2019. Governor Baker's order declaring a state of emergency due to the pandemic was issued nearly three months later, on March 10, 2020.[1] Government orders related to the pandemic cannot excuse Defendants' failure to pay Plaintiff wages that were earned more than three months before any order was ever declared.

Third-Party Breach: Next, Defendants' raise defenses of impossibility and frustration because a third-party, Defendants' client, stopped paying them. Defendants state that the lack of payment caused their failure to pay Plaintiff. Defendants, in raising this defense, confuse their liability under the Wage Act. Third-party breaches cannot excuse an employer's obligation to pay their employee. Indeed, employers are under strict liability for Wage Act violations such as failure to timely pay an employee. *Dixon*, 464 Mass. at 452. Put simply, "employers must suffer the consequences of violating the statute regardless of intent." *Id.* (internal quotes omitted).

Even if the Wage Act didn't impose a strict liability on employers, Plaintiff would still be entitled to wages for the labor already performed. When impossibility and frustration defenses are raised because of a third-party breach, workers are still entitled to compensation for the labor they provided. *See Young v. Chicopee*, 186 Mass. 518, 520 (1904) (stating that defendant "should be held liable for labor and materials actually wrought."); *see also Albre Marble & Tile Co. v. John Bowen Co.*, 338 Mass. 394, 398 (1959). Accordingly, a third-party breach cannot excuse Defendants' violation when Plaintiff has already provided his labor. The third, fourth, and fifth affirmative defenses should be dismissed.

iii. *Affirmative Defenses 2 and 6: Defendants failed to plead prima facie cases for unjust enrichment or set-off.*

Defendants assert affirmative defenses two and six, doctrine of offset and unjust enrichment, alleging Plaintiff's claims are barred in whole or in part because plaintiff has overstated the days and hours worked, and/or understated the remuneration received. However, the Answer fails to state how much the Plaintiff has allegedly overstated his hours worked, or understated the amount he was paid. In both instances, Defendants fail to adequately allege

[1] Office of Governor Charlie Baker and Lt. Governor Karyn Polito, Declaration of a State of Emergency to Respond to COVID-19, (Mar. 10, 2020). Available at: https://www.mass.gov/news/declaration-of-a-state-of-emergency-to-respond-to-covid-19.

sufficient facts to substantiate either defenses of unjust enrichment or set-off. Plaintiff responds to each in their respective order.

"Unjust enrichment is defined as retention of money or property of another against the fundamental principles of justice or equity and good conscience." *Santagate v. Tower*, 64 Mass. App. Ct. 324, 329-330 (2005) (quotation omitted). This definition is inconsistent with the scenario before the Court. First, unjust enrichment is a traditionally a contractual dispute inappropriately raised in wake of Defendants' Wage Act violations. *See id.* Further, Defendants have failed to plead sufficient facts that support Plaintiff has received money or property to which him keeping would go against the fundamental principles of justice, equity, or good conscience. Indeed, claiming that Plaintiff has both been unjustly enriched, and is also still owed money by the same entity claiming to have enriched Plaintiff is an oxymoron. It is impossible for Plaintiff to have been unjustly enriched if Defendants concurrently concede that they still owe money to Plaintiff.

Defendants' "doctrine of offset" defense, potentially referring to "a valid set-off" defense, requires Defendants to present a "clear and established debt owed to the employer by the employee." *Somers v. Converged Access, Inc.*, 454 Mass. 582 (2009). Defendants' Answer pleads no facts establishing any debt owed to them. Thus, there is no basis to invoke the valid set-off defense.

At best, both of these defenses dispute the *extent* of damages, but do not dispute the presence of liability. Defendants cannot both assert wages owed to Plaintiff are completely set-off while at the same time conceding that they stopped paying Plaintiff three months before Plaintiff stopped working. Affirmative defenses need not be consistent with one another, but in order to be successful they should at the very least be consistent with the facts alleged. According to facts alleged in the Complaint, and agreed upon in the Answer, Defendants' liability is established. Defendants violated the Wage Act. Strict liability should be imposed, and affirmative defenses two and six should be dismissed.

V. Conclusion

For the reasons set forth herein, Plaintiff respectfully request this Court grant their Motion for Partial Judgment on the Pleadings and award the relief sought in Count Three the Complaint.

Alternatively, Plaintiff request this Court holds (1) that Defendants violated the Massachusetts Wage Act and owe Plaintiff unpaid wages, and (2) direct the parties to engage in

fact-finding only to determine the amount owed. Additionally, Plaintiff request reasonable attorney's fees as this Court deems proper pursuant to the Massachusetts Wage Act.

Date: February 1, 2021

Respectfully submitted,
Plaintiff
By their attorneys,

*/s/*Raymond B. Simmons
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CERTIFICATE OF SERVICE

I hereby certify that I served the above motion via email at Dave@galusilaw.com,

February 1, 2021

/s/ Patricio S. Rossi

Patricio S. Rossi

Raymond B. Simmons

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WRITING SAMPLE

Please find my writing sample below. The writing sample is an Anti-SLAPP special motion to dismiss. The motion was filed as part of my representation of an indigent client of the Harvard Legal Aid Bureau.

Usually, the Bureau represents current or former employees who are seeking wages that have been unlawfully withheld by their employers. However, sometimes the Bureau takes cases with collateral issues stemming from an employee's pursuit of owed wages.

In this instant, a former client of a partner organization, Greater Boston Legal Services, was being sued by her former employer. The former employer claimed that our client stole from them. However, after meeting with opposing counsel, it seemed apparent that the employer did not have any basis for pursuing the suit. My practice group considered this to be against the spirit of Anti-SLAPP. So, I volunteered to take the client on and write this motion in support of their defense.

Please note, I have kept the declarations referenced in the motion attached for reference. However, the language in the declaration was a group project.

Sincerely,

Raymond B. Simmons

HARVARD LEGAL AID BUREAU
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(617) 495-4408 (617) 496-2687 (FAX)

April 12, 2021

Via e-File
Clerk of Courts
District Court
Chelsea Division

Re: Pleitez Wireless Corporation v. Ana Sanchez and Leidy Corral
Civil Action No.: 2014-CV-000161

To Whom It May Concern:

Enclosed for filing in the above referenced matter, please find Defendant and Counterclaim Plaintiff Ana Sanchez's Special Motion to Dismiss pursuant to Massachusetts Anti-SLAPP law, G.L. c. 231 § 59H. **Please schedule this matter to be heard on May 11, 2021 at 9:00AM.**

Please contact me with any questions or concerns.

Thank you for your attention to this matter.

Sincerely,

*/s/*Raymond B. Simmons
Raymond B. Simmons
S.J.C. Rule 3:03 Counsel
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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **DISTRICT COURT DEPARTMENT**
CHELSEA DIVISION

PLEITEZ WIRELESS CORPORATION Plaintiff, and Defendant in Counterclaim, v. ANA SANCHEZ, and LEIDY CORRAL Defendants, ANA SANCHEZ Plaintiff in Counterclaim, v. MELIDA MARTINEZ Defendant in Counterclaim	Docket No. 2014-CV-000161

DEFENDANT ANA SANCHEZ'S SPECIAL MOTION TO DISMISS
PURSUANT TO MASSACHUSETTS ANTI-SLAPP LAW

Pursuant to Massachusetts' anti-Strategic Litigation Against Public Participation ("anti-SLAPP") law, G.L. c. 231 § 59H, Defendant and Counterclaim Plaintiff Ana Sanchez ("Ms. Sanchez"), through counsel of record, respectfully moves for this Court to dismiss all claims asserted against her by Pleitez Wireless Corporation ("Pleitez" or "Plaintiff") in the original complaint filed on May 18, 2020 ("the Complaint").

I. INTRODUCTION

Ms. Sanchez is being sued by Plaintiff for appropriately asserting her First Amendment right to petition the government for redress. Ms. Sanchez was an employee of Pleitez for a number of years. After the company was sold to Melida Martinez ("Ms. Martinez"), Ms. Sanchez stayed on to work for Plaintiff. Unfortunately, for the entirety of their working relationship, Ms. Sanchez endured constant verbal abuse from Ms. Martinez, and was forced to resign nearly a month after Ms. Martinez purchased the company.

Shortly after resigning, Ms. Sanchez noticed that she was consistently underpaid by Plaintiff. Ms. Sanchez made a number of attempts to collect her unpaid wages, including retaining counsel, sending a demand letter to Plaintiff, meeting with a police detective, and filing a complaint against Plaintiff with the Massachusetts Office of Attorney General (the "AG's Office"). The AG's Office launched an investigation in light of Ms. Sanchez's complaint, and ultimately found Plaintiff had violated the Commonwealth's Wage Act. Accordingly, the AG's Office issued a citation to Plaintiff for its malfeasance.

In response, Plaintiff filed suit in this Court bringing meritless claims of breach of contract and other improprieties against Ms. Sanchez. In truth, Plaintiff has brought this suit solely in retaliation and to punish Ms. Sanchez for her protected petitioning activity. Not until Ms. Sanchez petitioned for owed wages did Plaintiff begin to make the allegations asserted in the Complaint.

First, Plaintiff unlawfully withheld Ms. Sanchez's wages for work she performed. Then, when Ms. Sanchez retained counsel and petitioned the government for redress, Plaintiff started to make outlandish and unsubstantiated allegations to intimidate her. Now, Plaintiff is suing Ms. Sanchez for her lawful and protected petitioning activity under the guise of a breach of contract claim. Indeed, Plaintiff's claims have no merit. Accordingly, each claim brought against Ms.

Sanchez should be dismissed with prejudice pursuant to the Massachusetts anti-SLAPP statute which protects from such lawsuits.

II. FACTUAL BACKGROUND

Ms. Sanchez first began working for Pleitez when it was owned by Jober Rivera ("Mr. Rivera"). Defendant Ana Sanchez Answer and Counterclaims ("Sanchez Answer") ¶ 6. During her time working for Mr. Rivera, Ms. Sanchez's job performance was frequently praised. *Id.* On or around May 1, 2019, Ms. Sanchez learned that Mr. Rivera had sold Pleitez to Ms. Martinez. *Id.* ¶ 8. From that point forward, Ms. Martinez acted as the owner of Pleitez and as Ms. Sanchez's boss.

From the beginning of their working relationship, Ms. Martinez was hostile towards Ms. Sanchez. *Id.* ¶ 10. Ms. Martinez would repeatedly scream at and criticize Ms. Sanchez's work. *Id.* Her criticisms went well beyond what would be considered acceptable in the workplace, including making demeaning remarks about Ms. Sanchez's religion. *Id.* at ¶ 12, *see also* Affidavit of Ana Sanchez ("Sanchez Aff.") ¶ 3. After nearly a month of enduring Ms. Martinez's hostilities and verbal abuse, Ms. Sanchez was left with no choice but to resign from her position at Pleitez on May 22, 2019. Sanchez Answer at ¶ 13.

Shortly after resigning, Ms. Sanchez discovered that she was consistently underpaid by Plaintiff. Sanchez Aff. at ¶ 4. In pursuit of recovering her unpaid wages, Ms. Sanchez retained Greater Boston Legal Services attorney Joseph Michalakes ("Attorney Michalakes"). Affidavit of Joseph Michalakes ("Michalakes Aff.") at ¶ 3. Confronted with Ms. Sanchez's retained counsel, Ms. Martinez refused to pay the wages owed, and began to claim that Ms. Sanchez stole from and did damage to Pleitez. *Id.* at ¶ 5-6. It was not until after Ms. Sanchez retained Attorney Michalakes that Ms. Martinez made such allegations. Sanchez Aff. at ¶ 6.

In furtherance of an attempt to resolve the dispute, Ms. Sanchez met with Ms. Martinez, Attorney Michalakes, Defendant Leidy Corral ("Ms. Corral"), police detective Rosa Medina and two community organizers at the offices of the Chelsea Collaborative on September 9, 2019. Michalakes Aff. at ¶ 8. Ms. Martinez continued to make theft allegations against Ms. Sanchez without presenting any evidence. *Id.* at ¶ 9.Ms. Martinez wrote a check to Ms. Corral, reimbursing her for Ms. Corral's stolen wages, but still refused to pay Ms. Sanchez. *Id.* at ¶ 10

Realizing that Ms. Martinez was uninterested in resolving the wage theft claim without further escalation, Attorney Michalakes filed a complaint with the AG's Office, requesting the office investigate Ms. Sanchez's claim. *Id.* at ¶ 11. Pursuant to the investigation, the AG's Office issued a citation to Pleitez for a total of $650, $250 in penalties and $400 in restitution for the violation to the Commonwealth's wage laws. *Id.* at ¶ 12. Only after the AG Office's investigation did Pleitez finally pay Ms. Sanchez her wages owed in the amount of $400. Sanchez Aff. at ¶ 11.

Very soon after the investigation, Pleitez filed this Complaint, which repeats the same baseless, unsupported allegations that Ms. Martinez first made after Ms. Sanchez began demanding her unpaid wages. *Id.* at 12. At no point prior to Ms. Sanchez petitioning activity, advocating for lawfully owed wages, did Ms. Martinez make any allegations of legal impropriety regarding Ms. Sanchez. Further, it was only after Ms. Sanchez asserted her rights and petitioned the AG's Office that Plaintiff filed the Complaint.

III. STANDARD OF REVIEW

Massachusetts' anti-SLAPP statute provides that any party in a lawsuit may bring a special motion to dismiss in any case in which the claims against them are based on that party's exercise of their "right to petition" for redress under the United States Constitution or the Commonwealth. G.L. ch. 231, § 59H. In the special motion process, parties may only refer to pleadings and

affidavits in their analysis. *Wenger v. Aceto*, 451 Mass. 1, 5 (2008). Thus, only the Complaint, Ms. Sanchez's Answer and Counterclaim, their attachments, and the affidavits attached hereto provide the factual material for the purposes of this motion. Upon granting the motion, the court shall award the moving party costs and reasonable attorney's fees, including those incurred for composing the special motion and any related discovery matters. G.L. ch. 231, § 59H.

IV. ARGUMENT

Plaintiff's Complaint asserts meritless allegations against Ms. Sanchez which are solely based on her complaint filed with the AG's Office regarding Plaintiff's Wage Act violations. Hiding behind a guise of accusations related to a breach of contract and theft, Plaintiff's real goal is to intimidate and punish Ms. Sanchez for her advocacy against them. Such lawsuits are violations of Massachusetts' anti-SLAPP statute, which was enacted to protect parties against "generally meritless suits brought…to deter common citizens from exercising their political or legal rights or to punish them for doing so." *Duracraft Corp. v. Holmes Prods. Corp.*, 427 Mass. 156, 162, 691 N.E.2d 935 (1998).

The anti-SLAPP legal analysis employs a two-stage, burden shifting, framework. *Cardno ChemRisk, LLC v. Foytlin*, 476 Mass. 479, 484, 68 N.E.3d 1180 (2017). Under the framework, Ms. Sanchez must first make a "threshold showing" that the claims against her are based on her petitioning activity alone. *Duracraft Corp.*, 427 Mass. at 167-68. Once Ms. Sanchez meets her threshold, the burden then shifts to Plaintiff to show that (1) Ms. Sanchez's original petition was baseless and (2) Ms. Sanchez's petition caused actual injury to Plaintiff. G.L. c. 231 §59H; *See Dever v. Ward*, 92 Mass. App. Ct. 175, 178 (2017).

Indeed, Plaintiff's sham lawsuit can only be based on Ms. Sanchez's protected petitioning activity. Plaintiff's claims lack any substantive basis, and arose only when Ms. Sanchez began

rightfully petitioning the AG's Office for redress. Further, Ms. Sanchez's original petitioning activity had merit under the Wage Act and did not cause Plaintiff any harm. Accordingly, each claim frivolously asserted against Ms. Sanchez should be dismissed.

a. Threshold: Plaintiff's allegations against Ana Sanchez are meritless and solely based on Ms. Sanchez's protected petition to the Office of Attorney General for redress.

Ms. Sanchez satisfies the threshold burden because the facts establish that (1) her complained conduct is petitioning activity, (2) the petitioning activity is her own, and (3) Plaintiff's claims are solely based on the petitioning activity. *Reichenbach v. Haydock*, 92 Mass. App. Ct. 567, 572-73 (2017). Generally, the anti-SLAPP statute's definition of petitioning is "very broad." *Duracraft Corp.*, 427 Mass. at 163; *but see Giuffrida v. High Country Inv'r, Inc.*, 73 Mass. App. Ct. 225, 243 (2008) (stating that the anti-SLAPP statute does not protect pre-litigation demand letters).

The statute's protections purposefully extend to those who have reported violations of law to any level of government. *Hanover v. New England Reg'l Council of Carpenters*, 467 Mass. 587, 592 (2014). Indeed, appeals to the police are defined as "quintessential petitioning activity" according to Massachusetts case law. *Dever*, 92 Mass. App. Ct. at 179. Upon learning Plaintiff violated the Wage Act by consistently underpaying her, Ms. Sanchez retained legal counsel, contacted a police detective, and filed a complaint with the AG's Office in pursuit of her rightfully owed wages. The AG's Office is part of the Commonwealth executive branch. Complaints to the AG's Office are required for Wage Act cases in order to receive a private right of action to sue in civil court[1]. Ms. Sanchez's actions were petitions to a government body, and were her own.

[1] There are two ways to receive a private right of action in cases of wage theft. First, is to request one from the Attorney General's Fair Labor Division. Second is to receive one from the AG's Office in response to a filed complaint. Both

Only after the AG's investigation, and subsequent citation against them, did Plaintiff bring suit in this Court. Having made no such accusations prior to Ms. Sanchez's petitioning activity, Plaintiff began to make unsubstantiated assertions that Ms. Sanchez stole from them. However, Plaintiff's claims are not based on substance or evidence. Indeed, the Complaint alleges no facts to support any claim that Ms. Sanchez ever stole from Plaintiff. That's because Plaintiff's goal is not to win this lawsuit. Instead, Plaintiff began making these accusations in an attempt to intimidate Ms. Sanchez and deter her from reporting its Wage Act violation. Now that Ms. Sanchez has been properly compensated as a result of the AG Office's investigation, Plaintiff seeks to punish her petitioning activity.

Ms. Sanchez's petitioning activity, the true motivating factor for Plaintiff's suit, is protected by the anti-SLAPP statute. While the Plaintiff has attempted to make a claim that does not at first glance appear to be directly related to Ms. Sanchez's petitioning activity, the Court should not allow them to evade the anti-SLAPP statute. The history of the Plaintiff's reaction to Ms. Sanchez's demand for her stolen wages shows that Plaintiff has been motivated to file this suit, not by actual harm or malfeasance on the part of Ms. Sanchez, but by Ms. Sanchez engaging in petitioning activity and filing a complaint against them with the AG's Office. In the spirit of protecting citizens from meritless lawsuits meant to chill or punish legal advocacy, the Court should dismiss these frivolous claims.

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measures would be considered petitioning activity as defined by the anti-SLAPP statute. Available at: https://www.mass.gov/service-details/workers-right-to-sue.

b. Ms. Sanchez's petition to the AG's Office had merit and did not cause any injury to Plaintiff.

Plaintiff is unable to meet its burden. Under the framework, Plaintiff must show that Ms. Sanchez's petitioning activity was baseless, and that Plaintiff suffered injury resulting from her actions. *See Dever*, 92 Mass. App. Ct. at 178. First, Ms. Sanchez's petitioning activity had merit. Ultimately, after an investigation in the AG's Office, Plaintiff was ordered to pay Ms. Sanchez unpaid wages for work she previously performed. Additionally, the AG's Office issued a citation to Plaintiff for its malfeasance. If Ms. Sanchez's claim was truly baseless and without merit, as Plaintiff would have to prove, then Ms. Sanchez would have never been awarded damages over Plaintiff's objections in the first place.

Further, Ms. Sanchez's protected petition did not cause any injury or harm to Plaintiff. While the AG's Office did assess a penalty and ordered Plaintiff to pay Ms. Sanchez previously unpaid wages, the AG's citation is not an injury. Indeed, the citation issued was the appropriate redress to make Ms. Sanchez whole as the Commonwealth's wage laws require. Accordingly, Plaintiff is unable to meet their burden of showing Ms. Sanchez's petition was baseless and caused them harm.

V. CONCLUSION

For the reasons set forth herein, Ms. Sanchez respectfully request this Court grant her Special Motion to Dismiss all claims with prejudice. Furthermore, Ms. Sanchez requests reasonable attorney fees and costs incurred associated with litigating the above captioned matter.

Date: April 12, 2021

Respectfully submitted,
Plaintiff
By her attorneys,

_/s/Raymond B. Simmons____
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CERTIFICATE OF SERVICE

I hereby certify that I served the above motion to plaintiff's counsel via email at sethsal@gmail.com, and defendant Leidy Corral's counsel via email at daniel@occenalaw.com.

April 12, 2021

_/s/Raymond B. Simmons____
Raymond B. Simmons

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **DISTRICT COURT DEPARTMENT**
CHELSEA DIVISION

PLEITEZ WIRELESS CORPORATION Plaintiff, and Defendant in Counterclaim, v. ANA SANCHEZ, and LEIDY CORRAL Defendants, ANA SANCHEZ Plaintiff in Counterclaim, v. MELIDA MARTINEZ Defendant in Counterclaim	Docket No. 2014-CV-000161

AFFIDAVIT OF JOSEPH MICHALAKES IN SUPPORT OF DEFENDANT SANCHEZ'S SPECIAL MOTION TO DISMISS

I, Joseph Michalakes, hereby swear and affirm the following:

1. My name is Joseph Michalakes. I am an Attorney with the Greater Boston Legal Services ("GBLS") in the Housing and Employment Units.

2. I live in Boston, MA, and my business address is 197 Friend St., Boston MA 02114.

3. I met Ms. Sanchez at a monthly know-your-rights event for workers at the Chelsea Collaborative that GBLS helped staff. Ms. Sanchez was there to seek assistance recovering her unpaid wages from her former employer Pleitez Wireless Corporation ("Pleitez"), owned and operated by Melida Martinez ("Ms. Martinez"). Ms. Sanchez

spoke to one of our summer interns, Emily Postman ("Ms. Postman"), who did an intake and collected basic facts. After Ms. Postman presented the case to our wage and hour team, we collectively decided that Ms. Postman would work on the case (and write a demand letter) under my supervision.

4. Ms. Postman investigated Ms. Sanchez's claim, including reviewing checks Ms. Sanchez received and records of her hours worked, and drafted a demand letter that I reviewed. After investigating Ms. Sanchez's case, which, we sent the letter on August 26, 2019 to Ms. Martinez and Pleitez on Ms. Sanchez's behalf demanding they pay Ms. Sanchez her unpaid wages, which included unpaid minimum wage claims and unpaid overtime claims. We calculated the total unpaid wages owed to Ms. Sanchez as $588.28.

5. On August 29, 2019, Ms. Martinez arrived at the GBLS offices and attempted to speak with me in person. I was busy and unable to do so, and my supervisor Audrey Richardson ("Ms. Richardson") spoke to Ms. Martinez. Ms. Richardson told me that Ms. Martinez alleged in this conversation that Ms. Sanchez had stolen from Pleitez.

6. Later that same day, I received a voicemail from Ms. Martinez. In the voicemail, Ms. Martinez attempted to deny some of the wage theft allegations before, at the end of the voicemail, obliquely implying that Ms. Sanchez had done damage to Pleitez. The only specific allegation of damage I understood Ms. Martinez to make was that Ms. Sanchez closed the store too early.

7. Ms. Sanchez denied the allegations of theft and damage to the business when I asked her about them. She had not mentioned being aware of any such allegations prior to us sending the demand letter for unpaid wages to Ms. Martinez.

8. In an effort to resolve the dispute, Gladys Vega and Yessenia Alfaro, community organizers with the Chelsea Collaborative, set up a mediation on Septemeber 9, 2019 with themselves, Ms. Martinez, Ms. Sanchez, Leidy Corral ("Ms. Corral"), another worker who was owed unpaid wages by Ms. Martinez, and myself. Also present was Rosa Medina, a detective with the Boston Police Department, who explained to Ms. Martinez that she was obligated to pay Ms. Sanchez and Ms. Corral their unpaid wages, regardless of any theft allegations she believed were true.

9. At the meeting, Ms. Martinez continued to repeat the theft allegations, despite not presenting any proof that Ms. Sanchez stole anything from Pleitez.

10. At the mediation, Ms. Martinez write a check and paid Ms. Corral the money she was owed but refused to pay anything to Ms. Sanchez.

11. Realizing that Ms. Martinez was uninterested in resolving this wage theft claim, I filed a Complaint with the Office of the Attorney General on Ms. Sanchez's behalf in November 2019 asking the Attorney General to investigate Ms. Sanchez's claim for unpaid wages.

12. The Office of the Attorney General issued their citation against Pleitez on March 12, 2020 for $650 ($250 penalty and $400 in restitution payable to Ms. Sanchez).

13. In July 2020, I became aware that Pleitez had sued Ms. Sanchez and Ms. Corral. In that Complaint, Pleitez repeated the theft allegations that Ms. Martinez first made in late summer 2019, after I sent the demand letter on Ms. Sanchez's behalf.

14. I believed that Pleitez's Complaint amounted to unlawful retaliation against Ms. Sanchez and Ms. Corral for asserting their rights to unpaid wages. I referred the Complaint to the Office of the Attorney General, and asked that they investigate whether Pleitez violated the anti-retaliation provision of the Massachusetts Wage Act by filing the Complaint. The Attorney General did open an investigation and I was interviewed for the investigation on February 10, 2021. To my knowledge the investigation is still ongoing.

Signed under the pains and penalties of perjury this 31st day of March, 2021

/s/ Joseph Michalakes

Joseph Michalakes

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **DISTRICT COURT DEPARTMENT**
CHELSEA DIVISION

PLEITEZ WIRELESS CORPORATION Plaintiff, and Defendant in Counterclaim, v. ANA SANCHEZ, and LEIDY CORRAL Defendants, ANA SANCHEZ Plaintiff in Counterclaim, v. MELIDA MARTINEZ Defendant in Counterclaim	Docket No. 2014-CV-000161

AFFIDAVIT OF ANA SANCHEZ IN SUPPORT OF DEFENDANT SANCHEZ'S

SPECIAL MOTION TO DISMISS

I, Ana Sanchez, hereby swear and affirm the following:

1. My name is Ana Sanchez. I am a former employee of Pleitez Wireless Corporation ("Pleitez"). Melida Martinez (Ms. Martinez) was my boss from May 1, 2019 to May 22, 2019.

2. I live in at 65 Spencer Avenue, Chelsea, MA 02150.

3. I resigned from Pleitez on May 22, 2019 after enduring weeks of harassment and religious discrimination from Ms. Martinez.

4. Believing that Pleitez and Ms. Martinez underpaid me, I attended a know-your-rights event at the Chelsea Collaborative. I met with an intern from the Greater Boston Legal Services ("GBLS") who interviewed me on my situation.

5. GBLS accepted my case, and sent a demand letter to Pleitez and Ms. Martinez.

6. Soon after GBLS sent the letter on my behalf, I learned from Joseph Michalakes ("Mr. Michalakes"), my attorney at GBLS, that Ms. Martinez responded to the demand letter by alleging that I stole from Pleitez and did damage to the business. I never stole from Pleitez or damaged the business in any way. Ms. Martinez had never made any such allegation during my work there or after I had resigned, until GBLS sent the letter demanding my unpaid wages.

7. In an effort to settle the dispute, I attended a mediation at the Chelsea Collaborative on September 9, 2019. There, Ms. Martinez continued to repeat the false theft allegations.

8. Ms. Martinez insulted me rather than admit to owing me the wages I had earned. She told me, "if you need money to eat, say so."

9. At the mediation, Ms. Martinez wrote a check to Leidy Corral, another former Pleitez employee who was owed unpaid wages, but refused to pay me.

10. After consulting with Mr. Michalakes, we decided to ask the Attorney General to investigate my claim for unpaid wages, and Mr. Michalakes filed a complaint with the Attorney General in November 2019.

11. In April 2020, I received $400 from Pleitez after the Attorney General issued their citation against Pleitez.

12. In October 2020, I was served with this lawsuit, which repeats the same baseless allegations that Ms. Martinez started to make only after I began asserting my rights to unpaid wages.

Signed under the pains and penalties of perjury this 6th day of April, 2021

/s/ Ana Sanchez

Ana Sanchez

I hereby certify that I translated this document from Spanish to English.

/s/ Sandra Panolis

Sandra Panolis

Applicant Details

First Name	**Derek**
Middle Initial	**S**
Last Name	**Story-Lee**
Citizenship Status	**U. S. Citizen**
Email Address	**derek.scott.lee115@gmail.com**
Address	**Address** Street **112 Trail Loop Drive #203** City **Paducah** State/Territory **Kentucky** Zip **42001** Country **United States**
Contact Phone Number	**2707035301**

Applicant Education

BA/BS From	**George Washington University**
Date of BA/BS	**May 2015**
JD/LLB From	**Washington University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014**
Date of JD/LLB	**May 23, 2023**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**Washington University Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Wiley Rutledge Moot Court Competition** **National Telecommunications and Technology Moot Court Competition** **National Appellate Advocacy Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Jacob, Greg
gjacob@omm.com
202-383-5110

Osgood, Russell
rosgood@wustl.edu

Moul, Jane
jmoul@wustl.edu
314-935-6495

Sachs, Rachel
rsachs@wustl.edu
(314) 935-8557

Tamanaha, Brian
btamanaha@wustl.edu
314-935-8242

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Derek Story-Lee
112 Trail Loop Drive #203
Paducah, KY 42001
270-703-5301
derek.scott.lee115@gmail.com

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing to apply for a clerkship in your chambers beginning in 2024 or for your next available position. I will be serving in Judge Lanny King's chambers in my home district of the Western District of Kentucky as his clerk for the 2023-2024 term.

I am a graduate of Washington University School of Law where I was ranked in the top 10% of my graduating class, participated in the school's premier national Moot Court team, and served as an Articles Editor for the Washington University Law Review. I knew before attending law school that I wished to serve by clerking at the trial and appellate levels, and I took every opportunity to prepare myself for that role. My coursework included Federal Courts, Remedies, Administrative Law, Criminal Procedure, and Evidence. I also sought out any opportunity to work on my writing, selecting notoriously writing-heavy courses such as Appellate Advocacy, and working in the school's clinics for multiple semesters. I also earned the privilege of an externship with Judge David Noce during my final semester. While in school I also worked at a St. Louis firm part-time to gain a private law perspective. My summers were spent both in public interest and large firm settings. I believe my experience and education would make me a valuable contributor in your chambers, and I would be honored to serve as your clerk.

Enclosed please find my résumé, transcript, and two writing samples. The first writing sample is my portion of a persuasive brief written for the Wiley Rutledge Moot Court Competition on the topic of standing under the Establishment Clause, which earned "Outstanding Brief" honors. The second writing sample is the Student Note I submitted for publication in the Washington University Law Review, which concerns the definition of the Press under the First Amendment. The following individuals have submitted letters of recommendation, but welcome inquiries as well.

Dean Osgood
WashULaw
rosgood@wustl.edu
314-935-4042

Professor Tamanaha
WashULaw
btamanaha@wustl.edu
314-935-8242

Professor Moul
WashULaw
jmoul@wustl.edu
314-935-6495

Professor Sachs
WashULaw
rsachs@wustl.edu
314-935-8557

Greg Jacob
O'Melveny & Myers LLP
gjacob@omm.com
202-383-5300

I would welcome any opportunity to interview with you. Thank you for your time and consideration.

Sincerely,

Derek Story-Lee

DEREK STORY-LEE

112 Trail Loop Drive #203 Paducah, KY 42001 • (270) 703-5301 • derek.scott.lee115@gmail.com

EDUCATION

WASHINGTON UNIVERSITY SCHOOL OF LAW St. Louis, MO
Juris Doctor | Certificate in Public Interest Law | GPA: 3.85 (Top 10%), *magna cum laude* May 2023

- *Washington University Law Review*: Vol. 100, Articles Editor; Vol. 99, Staff Editor
- Research Assistant for Dean Russell K. Osgood, Academic Year 2021-2022
- Order of the Coif; Order of Barristers; Judge Amandus Brackman Moot Court Award
- Wiley Rutledge Moot Court Competition Champion – 2021; Quarterfinalist – 2022; Outstanding Brief Award – 2021, 2022; Outstanding Advocate Award – 2022
- National Appellate Advocacy Moot Court Competition Regional Champion – 2023; Best Advocate (2nd Place) – 2023; National Octo-finalist – 2023
- National Telecommunications and Technology Moot Court Competition Semifinalist – 2021; Best Brief Award – 2021
- Phi Alpha Delta: Justice/President (2021–2022); Professional Development Chair (2020–2021)
- Federalist Society: Vice President (August 2021–May 2022)
- First Amendment Clinic – Rule 13 Certified Student Attorney (Spring 2022)
- Civil Rights, Community Justice, & Mediation Clinic – Rule 13 Certified Student Attorney (Fall 2022)

THE GEORGE WASHINGTON UNIVERSITY Washington, D.C.
Master of Arts in Public Policy May 2017
Bachelor of Arts in Philosophy May 2015

SELECTED EXPERIENCE

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY Paducah, KY
Term Clerk for Judge Lanny King 2023-2024 term

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI St. Louis, MO
Judicial Extern for Judge David Noce January 2023–April 2023

- Drafted order ruling on Motion to Dismiss and Motion to Strike in federal § 1983 case.
- Researched and proposed updates to the Eighth Circuit's model jury instruction for Odometer Fraud.
- Drafted consolidated report and recommendation on twenty motions filed by defendant in criminal trial.

GOLDSTEIN & PRICE, L.C. St. Louis, MO
Law Clerk October 2022–April 2023

- Drafted pre-trial motions to compel, for sanctions, and for a continuance for cases pending in Federal Court.
- Researched and drafted subpoenas for domestication in foreign jurisdictions for cases in Missouri and Wisconsin.
- Researched and drafted memoranda on issues such as comparative tax law between potential venues for the purchase of vessels, company liability for maintenance and cure under the Jones Act, and the effect of third-party settlement on defendant liability and ability to seek indemnification from co-defendants.
- Reviewed and summarized hundreds of discovery materials and depositions for supervisor review and use.

O'MELVENY & MYERS LLP Washington, D.C.
Summer Associate, Return Offer Extended June 2022–August 2022

- Conducted research to prepare Congressional testimony regarding the Constitutional privileges of the Office of the Vice President.
- Drafted a demand letter to a government agency on an expedited timeline.
- Researched and drafted memoranda regarding attorney-client privileges for third-party reports and investigatory authority of Attorneys General.
- Advised counsel on the applicability of the Securities and Exchange Act section 12(b) to a proposed transaction.
- Researched novel common-law interpretation for a brief before the Supreme Court of the United States.
- Created an outline for a brief before the Virginia Court of Appeals and drafted a significant section thereof.

INSTITUTE FOR JUSTICE Arlington, VA
Dave Kennedy Fellow June 2021–August 2021

- Researched potential challenges to and drafted memoranda on State and Federal court decisions.
- Completed media training on attorney press interactions through mock interviews and press conferences.
- Analyzed the application of administrative regulations and drafted a recommendation document on the same.

HOGAN LOVELLS US LLP Louisville, KY
Compliance Coordinator November 2019–July 2020

- Maintained firm compliance with relevant European Union directives, ABA standards, and sanctions regulations.
- Managed team workflow, assignments, and communication with intra-firm stakeholders and partners.
- Conducted Client Due Diligence for new and long-standing firm clients.
- Conducted risk assessments for new clients and assigned risk scores.
- Participated in *ad hoc* committees and teams to address developments in regulations and law.

Compliance Analyst May 2019-November 2019
Junior Compliance Analyst August 2017–May 2019

THE FRANKLIN INSTITUTE FOR GOVERNMENT AND PUBLIC INTEGRITY Washington, D.C.
Charles Koch Institute Intern May 2014–August 2014

- Researched and drafted opinion editorials for placement in national publications either as the primary author or as a ghostwriter for the organization leadership.
- Drafted and disseminated summaries of news segments for distribution to outlets of both a regional and national audience.

SKILLS & INTERESTS

Competitive Ballroom Dancing, Science Fantasy (Star Wars), Dungeons and Dragons, and Martial Arts

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Washington University in St. Louis

Office of the University Registrar

Record Of: **Story-Lee, Derek Scott**
Student ID Number: 493859

Degrees Awarded:
CERTIFICATE IN PUBLIC INTEREST LAW MAY 10, 2023
JURIS DOCTOR MAY 10, 2023
GRADUATED WITH LAW HONORS: MAGNA CUM LAUDE MAY 10, 2023

Transcript Issued 06/14/2023 To:

RECIPIENT AS DESIGNATED BY STUDENT

Fall Semester 2020

LEGAL RESEARCH METHODOLOGIES I	LAW	W74 500D	0	CIP
LEGAL PRACTICE I: OBJECTIVE ANALYSIS AND REASONING (MOUL)	LAW	W74 500H	2.0	A
CONTRACTS (DEGEEST)	LAW	W74 501D	4.0	A-
PROPERTY (SACHS)	LAW	W74 507W	4.0	A+
TORTS (TAMANAHA)	LAW	W74 515D	4.0	A

Enrolled Units 14.0 Semester GPA 3.91 Cumulative Units 14.0 Cumulative GPA 3.91

Spring Semester 2021

LEGAL RESEARCH METHODOLOGIES II	LAW	W74 500E	1.0	HP
LEGAL PRACTICE II: ADVOCACY (MOUL)	LAW	W74 500J	2.0	A
CRIMINAL LAW (OSGOOD)	LAW	W74 502D	4.0	A
NEGOTIATION (TOKARZ/MERSMANN)	LAW	W74 503G	1.0	CR
CIVIL PROCEDURE (P. KIM)	LAW	W74 506G	4.0	A+
CONSTITUTIONAL LAW (CRUM)	LAW	W74 520R	4.0	A+

Enrolled Units 16.0 Semester GPA 3.95 Cumulative Units 30.0 Cumulative GPA 3.93

Fall Semester 2021

REMEDIES (LEVIN)	LAW	W74 567L	2.0	A-
EMPLOYMENT DISCRIMINATION (P. KIM)	LAW	W74 590F	3.0	A
APPELLATE ADVOCACY (FINNERAN/VAN OSTRAN)	LAW	W74 660B	3.0	B+
MOOT COURT (WILEY RUTLEDGE MOOT COURT COMPETITION)	LAW	W75 604S	1.0	CR
JURISPRUDENCE SEMINAR (TAMANAHA)	LAW	W76 796S	3.0	A
LAW REVIEW	LAW	W77 600S	1.0	CR

Enrolled Units 13.0 Semester GPA 3.70 Cumulative Units 43.0 Cumulative GPA 3.87

Spring Semester 2022

EVIDENCE (HARAWA)	LAW	W74 547N	3.0	B+
LEGAL PROFESSION (JOY)	LAW	W74 563U	3.0	B+
CRIMINAL PROCEDURE: ADJUDICATION (EPPS)	LAW	W74 580T	3.0	A
FIRST AMENDMENT CLINIC	LAW	W74 604C	6.0	P
LAW REVIEW	LAW	W77 600S	1.0	CR
SUPERVISED MOOT COURT	LAW	W79 500	1.0	CR

Enrolled Units 17.0 Semester GPA 3.58 Cumulative Units 60.0 Cumulative GPA 3.82

Keri A. Disch, University Registrar

TO VERIFY: TRANSLUCENT GLOBE ICONS MUST BE VISIBLE WHEN HELD TOWARD A LIGHT SOURCE

Washington University in St. Louis

Office of the University Registrar

Record Of: **Story-Lee, Derek Scott**
Student ID Number: 493859

Fall Semester 2022

FEDERAL COURTS (HOLLANDER-BLUMOFF)	LAW	W74 634G	4.0	A+
CIVIL RIGHTS, COMMUNITY JUSTICE & MEDIATION CLINIC	LAW	W74 769E	6.0	P
MOOT COURT (WILEY RUTLEDGE MOOT COURT COMPETITION)	LAW	W75 604S	1.0	CR
LAW REVIEW	LAW	W77 700S	2.0	CR

Enrolled Units 13.0 Semester GPA 4.00 Cumulative Units 73.0 Cumulative GPA 3.84

Spring Semester 2023

ADVANCED PERSUASIVE WRITING (FINN)	LAW	W74 523K	2.0	A+
ADMINISTRATIVE LAW (LEVIN)	LAW	W74 530A	3.0	A
JUDICIAL CLERKSHIP EXTERNSHIP	LAW	W74 654E	3.0	CR
PRETRIAL PRACTICE: CRIMINAL	LAW	W74 658Z	3.0	P
NATIONAL MOOT COURT TEAM	LAW	W75 606P	1.0	CR
LAW REVIEW	LAW	W77 700S	2.0	CR

Enrolled Units 14.0 Semester GPA 3.98 Cumulative Units 87.0 Cumulative GPA 3.85

Distinctions, Prizes and Awards

FL2020 DEAN'S LIST
SP2021 DEAN'S LIST
SP2021 HONOR SCHOLAR AWARD
FL2022 DEAN'S LIST
SP2023 ORDER OF BARRISTERS
SP2023 HONOR SCHOLAR AWARD
SP2023 DEAN'S LIST
SP2023 JUDGE AMANDUS BRACKMAN MOOT COURT AWARD
SP2023 ORDER OF THE COIF

********** **END OF TRANSCRIPT** **********

Keri A. Disch, University Registrar

TO VERIFY: TRANSLUCENT GLOBE ICONS MUST BE VISIBLE WHEN HELD TOWARD A LIGHT SOURCE

Washington University in St. Louis
Office of the University Registrar
One Brookings Drive, Campus Box 1143, St. Louis, MO 63130-4899 www.registrar.wustl.edu 314-935-5959

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Transcript Nomenclature
Transcripts issued by Washington University are a complete and comprehensive record of all classes taken unless otherwise indicated. Each page lists the student's name and Washington University student identification number. Transcript entries end with a line across the last page indicating no further entries.

Degrees conferred by Washington University and current programs of study appear on the first page of the transcript. The Degrees Awarded section lists the date of award, the specific degree(s) awarded and the major field(s) of study.

Courses in which the student enrolled while at Washington University are listed in chronological order by semester, each on a separate line beginning with the course title followed by the academic department abbreviation, course number, credit hours, and grade.

Honors, awards, administrative actions, and transfer credit are listed at the end of the document under "Distinctions, Prizes and Awards" and "Remarks".

Course Numbering System
In general course numbers indicate the following academic levels: courses 100-199 = first-year; 200-299 = sophomore; 300-399 = junior; 400-500 = senior and graduate level; 501 and above primarily graduate level. The language of instruction is English unless the course curriculum is foreign language acquisition.

Unit of Credit/Calendar
Most schools at Washington University follow a fifteen-week semester calendar in which one hour of instruction per week equals one unit of credit. Several graduate programs in the School of Medicine and several master's programs in the School of Law follow a year-long academic calendar. The Doctor of Medicine program uses clock hours instead of credit hours.

Academic and Disciplinary Notations
Students are understood to be in good academic standing unless stated otherwise. Suspension or expulsion, i.e. the temporary or permanent removal from student status, may result from poor academic performance or a finding of misconduct.

Grading Systems
Most schools within Washington University employ the grading and point values in the Standard column below. Other grading rubrics currently in use are listed separately. See www.registrar.wustl.edu for earlier grading scales, notably for the School of Law, Engineering prior to 2010, Social Work prior to 2009 and MBA programs prior to 1998. Some programs do not display GPA information on the transcript. Cumulative GPA and units may not fully describe the status of students enrolled in dual degree programs, particularly those from schools using different grading scales. Consult the specific school or program for additional information.

Rating	Grade	Standard Points	Social Work
Superior	A+/A	4	4
	A-	3.7	3.7
	B+	3.3	3.3
Good	B	3	3
	B-	2.7	2.7
	C+	2.3	2.3
Average	C	2	2
	C-	1.7	1.7
	D+	1.3	0
Passing	D	1	0
	D-	0.7	0
Failing	F	0	0

Grade	Law Values (Effective Class of 2013)
A+	4.00-4.30
A	3.76-3.94
A-	3.58-3.70
B+	3.34-3.52
B	3.16-3.28
B-	3.04-3.10
C+	2.92-2.98
C	2.80-2.86
D	2.74
F	2.50-2.68

Additional Grade Notations			
AUD	Audit	NC/NCR/NCR#	No Credit
CIP	Course in Progress	NP	No Pass
CR/CR#	Credit	P/P#	Pass
E	Unusually High Distinction	PW	Permitted to Withdraw
F/F#	Fail	R	Course Repeated
H	Honors	RW	Required to Withdraw
HP	High Pass	RX	Reexamined in course
I	Incomplete	S	Satisfactory
IP	In Progress	U	Unsatisfactory
L	Successful Audit	W	Withdrawal
LP	Low Pass	X	No Exam Taken
N	No Grade Reported	Z	Unsuccessful Audit

(revised 11/2020)

O'Melveny

O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006-4061

T: +1 202 383 5300
F: +1 202 383 5414
omm.com

File Number:

January 1, 2023

Greg Jacob
D: +1 202 383 5110
gjacob@omm.com

To Whom It May Concern:

I write to enthusiastically recommend Derek Lee for a judicial clerkship. I am a partner at the law firm of O'Melveny & Myers LLP, and I served as Counsel to Vice President Mike Pence from March 2020 through January 2021.

While serving as a 2021 summer associate in our Washington, D.C. office, Derek was my assigned mentee, and he further performed substantive work directly for me on a highly sensitive legal research project. Derek's legal research, clarity of writing, and analytical ability were all well above the level of most law students. I would rate the quality of his work as comparable to what I would typically expect from a third or fourth year O'Melveny associate, most of whom have themselves clerked. Derek was also highly conscientious in getting his work completed on a tight deadline, and good about communicating to ensure that his final work product met expectations.

The specific project Derek worked on for me related to my former role as Counsel to the Vice President. During the summer of 2021, I was required to provide live testimony to the "Select Committee to Investigate the January 6th Attack on the United States Capitol." In addition, as Vice President Pence's representative for handling record requests to the National Archives seeking Vice Presidential Records, I was required to quickly respond to numerous requests for documents, and also to make associated privilege determinations, on an expedited basis, and in a politically fraught environment that required interaction not only with the National Archives, but also with the current White House and with representatives of former President Trump. Vice Presidential Records are not a well-defined category of documents under the Presidential Records Act ("PRA"), and the specific circumstances of January 6—a day on which Vice President Pence served in his constitutionally designated role as President of the Senate, an Article I function outside the Executive Branch—gave rise to highly complicated legal questions, both concerning the application of relevant constitutional privileges, and the interpretation of regulations and administrative guidance issued by the National Archives. I asked Derek to examine specific questions that required research and analysis involving both constitutional and administrative law, which needed to be completed very quickly to inform strategic and appropriate interactions on pending record requests. The memorandum Derek wrote was thorough, thoughtful, and comprehensive. Derek also demonstrated during oral follow-up conversations that he had absorbed and thought through a variety of relevant ancillary issues, and our conversations helped inform the specific approach I ultimately chose to take to certain pending requests.

O'Melveny

I am confident Derek would generate similarly high-quality work as a judicial clerk. I will note that I also found Derek's intellectual curiosity and knowledge base made for very engaging conversations on subjects unrelated to his assigned work. I am confident Derek would be an excellent addition to any chambers, and I am personally hopeful that he will one day accept O'Melveny's standing offer so that I have the opportunity to work with him again. Please do not hesitate to call me if I can provide you any further information about Derek.

Sincerely,

Gregory F. Jacob

OMM_US:80974531.1

Washington University in St. Louis
SCHOOL OF LAW

July 19, 2021

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Recommendation for Derek Lee

Dear Judge Davis:

It is a pleasure for me to recommend as a future clerk Derek Lee, who is completing his second year at Washington University School of Law. I am the Dean and visiting Professor of Law (since 2011) at Washington University School of Law. Before that, I was the President of Grinnell College (1998-2010), and, prior to that, the Dean (1988-1998) and a faculty member (1980-1998) at Cornell Law School.

I first got to know Derek when I had him as a student in a large section of our basic Criminal Law course (the substantive law of crimes with some criminal procedure) during the spring of 2021. I got to know Derek very well in the class for several reasons. First, he wrote an excellent mid-semester paper on the controversial topic of the proper scope of qualified immunity for police officers. It was a measured and intelligent paper on a topic that is the subject of lots of heated and not informed discussions. In addition to this paper Derek was an active and intelligent participant in class discussion and visited me several times during office hours. During one of those meeting he told me that he had no idea how to prepare for the examination in my course so we talked about it and during the class review session it was obvious he was preparing well. He wrote a terrific final examination and received one of the highest grades in the course (A). His exam was comprehensive, erudite and beautifully composed. After the semester ended Derek was elected (based on his writing) as an Editor of our flagship *Law Review*.

I recommend Derek without any reservation. He is both extraordinarily hardworking and sharp. Derek is mature and personable and would be a good person to have in chambers.

If anyone would like to speak with me about this excellent potential clerk give me a call at 641-821-3712.

Best,

/s/

Russell K. Osgood
Dean
Professor of Law

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Washington University in St. Louis
SCHOOL OF LAW

May 16, 2022

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Recommendation for Derek Story-Lee

Dear Judge Davis:

I write in enthusiastic support of Derek Lee's application for a clerkship in your chambers. Derek was a student in my Legal Practice class last academic year. He is an impressive critical thinker and displays the analytical aptitude, intellectual curiosity, and work ethic to excel in any legal setting.

Legal Practice class introduces first year law students to key lawyering skills by simulating representation of a variety of clients in a way that calls on the students to conduct legal research, interview witnesses, draft legal documents, etc. Last year I met with Derek for class twice a week in a small group of twenty-nine students. Further, students had two required research conferences with me during the year where they played the role of a junior attorney orally reporting on research results. They also had the option of meeting in additional individual conferences with me before each graded paper was due.

Derek was always thoroughly prepared for class. He consistently contributed to discussions and class activities, and he consistently demonstrated a genuine interest in learning the law. During the required research conferences, he dug deeply into the research and analysis in a manner that many first year students do not. During those research conferences, Derek's presentations were thorough and professional. And even though his written work product consistently earned high marks, he took full advantage of opportunities to meet in the optional individual conferences to work on achieving ongoing improvement in his legal practice skills. He routinely came to our meetings with a prepared list of questions, which facilitated the most effective and efficient use of our time together.

Further, I knew Derek to otherwise go above and beyond. For example, for an oral argument exercise engaged in by the first year class I needed several students to argue twice to equalize advocates on each side in the matter. Derek readily volunteered. I am confident that his natural inclination to help will result in effective collaboration with, and support of, others in your chambers. As another example, I found Derek to be a natural leader. Last year I held a group open office hour two days before each graded paper was due.

Derek always attended and often led the charge in asking questions during this session. This was more challenging last year than in those past due to the sessions occurring remotely instead of in person, but Derek still reliably asked many questions that were to the benefit of all attending.

During the fall semester, Derek's grade was based primarily on drafting two substantial office memoranda, one of which involved a research project. During this second semester, the grade was based primarily on two court briefs, one of which also included an involved research project. I know from our individual conferences that Derek sometimes found word count limits challenging (as did his classmates and as was intended), such that he spent hours developing critical editing skills in meeting the limits with his final papers. Ultimately, Derek's excellent reasoning skills, concise writing, and attention to detail earned him an A in Legal Practice for each of the fall and spring semesters.

In working with Derek in class and numerous individual conferences, I have come to know him as a personable, dependable individual who is serious, but has a quick sense of humor. He works well with others because he is sincere and helpful. He has a tenacious, seemingly tireless work ethic, and he was unfailingly engaged and professional last year even in the face of the inevitable stresses of law school and the pandemic times. Given such qualities, along with his excellent lawyering skills and strong interest in the legal process, I believe Derek Lee will contribute much as a law clerk and highly recommend him. If you have any questions about this letter, please do not hesitate to contact me.

Best,

/s/

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Professor of Practice

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